Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

E. I. DU PONT DE NEMOURS AND COMPANY,

Petitioner,

v.

BARBARA R. SHERIDAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a gender-based Title VII case, a jury can draw a reasonable inference of intentional discrimination where all of the facts presented at trial, when reviewed under Fed. R. Civ. Pro. 50(b), do not contain any evidence, circumstantial or otherwise, related to impermissible discrimination.

PARTIES IN THE COURT BELOW

The parties to the proceeding below were Petitioner, E. I. du Pont de Nemours and Company, an employee of Petitioner, Jacques Amblard, whose dismissal was affirmed by the court of appeals, and Respondent, Barbara R. Sheridan.

RULE 29.6 STATEMENT

E. I. du Pont de Nemours and Company ("DuPont") has no parent company.

There are presently five publicly held entities in which DuPont, or a subsidiary or affiliated company of DuPont, owns an interest: DuPont Canada Inc. and DuPont Photomasks, Inc. are subsidiary companies, and Shaman Pharmaceuticals, Inc., DNAP Holding Corporation, and Etec Systems, Inc. are companies in which DuPont holds a minority, non-controlling interest.

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PETITION FOR A WRIT OF CERTIORARI

E. I. du Pont de Nemours and Company ("DuPont") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The in banc opinion of the court of appeals is reported at 100 F.3d 1061. The opinion is reproduced in the Appendix (hereinafter "App.") at App. 1a-71a. The panel decision of the court of appeals is reported at 74 F.3d 1439 (withdrawn from publication). [App. 72a-116a]. The opinion of the district court is not officially reported. [App. 117a-136a].

JURISDICTION

The judgment of the court of appeals based on its in banc decision was entered November 14, 1996. [App. 139a-140a].

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a), provides:

> (a) Employer Practices
>
> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Respondent Barbara Sheridan was first employed by DuPont in 1979 as a waitress in the Hotel du Pont's dining room. She held a number of positions, progressing to head captain by May, 1989. Her annual performance review for 1990 indicated that her overall performance was very good. However, beginning in 1991, Sheridan's

job performance deteriorated. During that year, she was counseled on infractions of hotel policy, as well as failure to treat other staff with respect. Finally, in November, 1991, Sheridan was placed on a six-month probation for failure to correct her performance problems, including tardiness and leaving her position in the restaurant while on duty. She was informed that she would be taken off probation if the performance deficiencies were corrected.

In early 1992, it came to the attention of her management that Sheridan was giving away complimentary food and beverage items without properly recording the transactions in violation of hotel policy and state Alcohol and Beverage Control Commission regulations. After an investigation that revealed, *inter alia,* that Sheridan had not recorded more than $900 in complimentary beverages, management decided to reassign Sheridan to another position in the hotel where she would not have cash-handling responsibilities. She was offered three possible positions from which to choose at the same rate of pay. Sheridan took seven weeks vacation, then resigned from DuPont in April, 1992.

After being given no relief from the EEOC, Sheridan filed a complaint in the United States District Court for the District of Delaware, alleging intentional discrimination in failing to promote her, retaliation, and constructive discharge in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) *et seq.* After a six-day trial the jury found that Sheridan had not been qualified for the job she had sought and that DuPont had not retaliated against her because of her gender. However, the jury did find that Sheridan had been constructively discharged.

On post-trial motions, the district court adopted the jury recommendations on the promotion and retaliation claims. However, pursuant to Fed. R. Civ. Pro. 50(b), the district court entered judgment for DuPont on the constructive discharge claim.

Even after combing the record, the district court was "still left searching the record for evidence that gender played a determinative role in [DuPont's] conduct." [App. 125a]. The district court could not find where Sheridan had been treated different from other employees "because she was a woman." [App. 126a]. Finding no evidence or inferences that could support the jury's verdict, the district court concluded that evidence relevant to the claim of constructive discharge alone would not support an inference that DuPont undertook to reassign Sheridan for discriminatory reasons. [App. 125a, 128a]. As to the evidence that no woman had ever held the position of Manager of Restaurants, to which Sheridan had aspired (and for which the jury had found her not qualified) and the fact that a man eventually replaced her as head captain, the district court found these facts insufficient to raise an inference of discriminatory intent. [App. 126a-127a]. In fact, two of the remaining four head captain positions were filled by women. [App. 127a].

The district court concluded:

> In order to demonstrate that gender was a motivating factor, plaintiff would have to point to some evidence that that was the motive of those in the decision-making process. No such evidence exists in the record. [App. 128a].

A panel of the United States Court of Appeals for the Third Circuit reversed, finding that a trier of fact "could have found that DuPont's proffered reasons for the constructive termination were pretextual." [App. 88a]. The panel majority noted that there is a difference of opinion among the circuits on whether this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993), requires more than merely disbelief of the employer's proffered reasons for the employment action. [App. 86a-87a]. The panel majority felt required by Third Circuit precedent to reverse the entry of judgment for DuPont, noting that the Third Circuit was with that group of circuits that require no further proof of discriminatory intent beyond the prima facie case when discrediting the employer's proffered reasons. [App. 87a-88a].

Upon rehearing in banc, the Third Circuit again reversed the district court's grant of judgment in DuPont's favor and remanded to the district court to reconsider DuPont's motion for new trial. The majority of the Court of Appeals found:

> It is the jury's determination that the reason given [by the employer] was pretextual together with the evidence that supported the prima facie case that will sustain a finding of intentional discrimination made after a proper charge. [App. 26a].

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

In holding that a factfinder can infer that an employer acted in an intentionally discriminatory manner based on a finding that the proffered reasons were not correct and the minimal facts of the prima facie case, the court of appeals' in banc decision has dramatically added to the deep and abiding split of authority among the circuits on this issue. The result is that litigants face drastically differing standards from circuit to circuit. All of the circuits have addressed this issue.

In the past year, certainly since *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *cert. granted, in part, sub nom., Merrill v. Barbour*, 116 S.Ct. 805 (1995), *cert. dismissed*, 116 S.Ct. 1037 (1996), the conflict among the circuits has become deep, clear, and persistent on whether a plaintiff may be required to show more than the minimal prima facie case and rebuttal evidence to the employer's proffer of non-discriminatory reasons for the employment action in order to permit a jury to draw an inference of the ultimate fact of discrimination. The instant case places the division of the circuits in clear relief.

The court of appeals' decision in the instant case is in conflict with the Fifth Circuit's in banc decision in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (in banc). The court below readily admitted that its decision was at odds with the holding in *Rhodes*. [App. 17a n.7]. Indeed, the Fifth Circuit held that a plaintiff must satisfy the dual burden of proving that each of the employers' proffered

reasons were false *and* that there was a reasonable inference that impermissible discrimination was a determinative factor. *Rhodes*, 75 F.3d at 994. If a plaintiff's evidence establishing the prima facie case and rebutting the employer's proffered reasons is not substantial, a jury cannot reasonably infer discriminatory intent. *Id.*

> The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory. *Ibid.*

Decisions by panels of the Fifth Circuit since *Rhodes* bear out the fact that that circuit follows a very different course from that chartered by the Third Circuit in this case. *LaPierre v. Benson Nisson, Inc.*, 86 F.3d 444, 450 (5th Cir. 1996) (reaffirming that plaintiff must prove falsity of employer's reasons and that there was a sufficiency of evidence to draw an inference of discrimination, often with evidence beyond that needed to rebut the employer's proffered reasons); *Grimes v. Texas Dept. of Mental Health and Mental Retardation*, 102 F.3d 137 (5th Cir. 1996) (no evidence which constitutes or suggests improper animus); *Haun v. Ideal Industries, Inc.*, 81 F.3d 541, 546 (5th Cir. 1996) (even proof that employer lied to employee as to reason for discharge is not adequate, without more evidence, to prove discrimination).

Similarly, the court of appeals' decision in the instant case also conflicts with the decisions of the First, Second, Fourth, Eighth and Eleventh Circuits.

The most oft cited case for the First Circuit's view is the opinion in *Woods v. Friction Materials, Inc.*, 30 F.3d 266

(1st Cir. 1994). In that case, the First Circuit affirmed the grant of summary judgment in favor of the employer, finding that the employee had "failed to present sufficient evidence to permit a reasonable factfinder to infer that [the employer's] articulated reason was a pretext for unlawful . . . discrimination." *Id.* at 262. The First Circuit interpreted *Hicks* as making clear that even where pretext is shown, summary judgment still may be appropriate in favor of the employer because an inference of discrimination is not always permissible; the strength of the prima facie case and the significance of the pretext depends on the circumstances and individual facts of each case. *Ibid.* at 261 n.3; *accord Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 16, 18 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1958 (1995) (holding that plaintiff's prima facie case and proof of pretext were insufficient to support an inference of discrimination).

The First Circuit has continued to adhere to this view. In *Lattimore v. Polaroid Corp.*, 99 F.3d 456 (1st Cir. 1996), the First Circuit stated that "Title VII requires proof of something more than pretext. . . . [T]he employee also must prove that the employer was motivated by a discriminatory purpose." *Id.* at 465, 467.

The Second Circuit, in *Fisher v. Vassar College*, 70 F.3d 1420 (2d Cir. 1995), and later in *Nembhard v. Memorial Sloan Kettering Cancer Center*, No. 96-7406, 1996 U.S. App. LEXIS 30738 (2d Cir. Nov. 22, 1996) (unpublished); *Reece v. New York State Dept. of Tax and Fin.*, No. 96-7291, 1996 U.S. App. LEXIS 29458 (2d Cir. Nov. 12, 1996) (unpublished); and *Jafri v. Arthur Levitt, Jr.*, No. 96-6088, 1996 U.S. App. LEXIS 28664 (2d Cir. Nov. 1, 1996) (unpublished), has also indicated that something more

than pretext may be required to establish intentional discrimination.

In *Fisher*, the Second Circuit, agreeing with the First Circuit in *Woods*, stated that a finding of discrimination will not always be permissible from the prima facie case and disbelief of the employer's proffered reasons. *Fisher*, 70 F.3d at 1437.[1] The Second Circuit determined that the finding of pretext in *Fisher* was not enough to justify a finding of discrimination, as it pointed "nowhere." *Id.* Therefore, the Second Circuit, even though the plaintiff established pretext, declined to affirm the ultimate finding of discrimination. *Ibid.*

The Second Circuit has reaffirmed this position in the more recent cases of *Reece* and *Jafri*. In *Reece*, the Second Circuit determined that the plaintiff had to show both that the employer's reasons were false, and that intentional discrimination was the real reason for the termination. *Reece*, 1996 U.S. App. LEXIS 29458 at *8. Summary judgment was affirmed for the employer because the employee failed to offer any evidence that his termination was motivated by intentional discrimination; at most, the court stated, the employee offered facts of personal, rather than discriminatory, animus. *Id.* Likewise in *Jafri*, summary judgment in favor of the employer was affirmed because the employee simply offered no evidence, besides his own conclusory allegations, that his age, national origin, or religion was a factor in the employment decision. *Jafri*, 1996 U.S. App. LEXIS 28664 at *6-7.

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[1] The *Fisher* court did acknowledge that in some cases, like *Binder v. Long Island Lighting Co.*, 57 F.3d 193 (2d Cir. 1995), the finding of pretext will be sufficient. *Id.*

While the Second Circuit affirmed the district court's denial of the employer's judgment as a matter of law in *Nembhard*, the Second Circuit, nevertheless, determined that plaintiff was entitled to prevail because not only was there evidence of pretext, but also evidence of disparate treatment and age-based comments. *Nembhard*, 1996 U.S. App. LEXIS 30738 at *13-14. The evidence of pretext, coupled with this other evidence, supported the conclusion that discrimination was the motivation behind the employee's termination. *Id.*

Jiminez v. Mary Washington College, 57 F.3d 369 (4th Cir.), *cert. denied*, 116 S.Ct. 380 (1995), also stands for the proposition that the rejection of the employer's reasons coupled with the elements of the prima facie case does not automatically entitle the plaintiff to judgment, as the factfinder may determine that although the employer's conduct was pretextual, it did not constitute invidious discrimination. *Id.* at 378. The Fourth Circuit in *Jiminez* reversed judgment for plaintiff because he failed to prove that he was a victim of invidious discrimination. *Ibid.* at 384.

The court of appeals' decision in the present case is also in conflict with the Eighth Circuit's decisions in *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095 (8th Cir. 1996), and *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996). In *Rothmeier*, the Eighth Circuit affirmed the district court's grant of summary judgment to employer, determining that *Hicks* did not set forth a blanket rule that once evidence of pretext is proffered, that evidence together with the prima facie case will always shield a plaintiff from summary judgment; rather, *Hicks* allows a judge to decide on summary judgment that the

evidence of pretext may be insufficient to infer intentional discrimination even though fact issues regarding pretext have been created. *Rothmeier*, 85 F.3d at 1335. The Eighth Circuit stated that if all of the evidence taken together does not allow a factfinder to infer discriminatory animus, then plaintiff must come forward with some additional facts beyond the prima facie case and showing of pretext, which it determined plaintiff failed to do. *Id.* at 1336 (quoting *Krenik v. County of Le Sueur*, 47 F.3d 953, 958 (8th Cir. 1995)).

Likewise, the Eighth Circuit in *Kehoe* stated that in those cases where the proof of pretext does not serve the double duty of permitting an inference of discrimination, plaintiff must also present evidence capable of proving that the real reason for the employment action was intentional discrimination. *Kehoe*, 96 F.3d at 1102.[2]

In addition, a recent Eleventh Circuit opinion views *Hicks* contrary to the court of appeals in the present case. In *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 442 (11th Cir. 1996), where judgment as a matter of law was affirmed in favor of the employer, the Eleventh Circuit determined that *Hicks* supported the conclusion that only "sometimes" will the plaintiff's prima facie case and disbelief of the employer's reason allow plaintiff to

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[2] The Eighth Circuit noted that "[d]espite the somewhat expansive tenor of" *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104 (8th Cir.), *cert. denied*, 115 S.Ct. 355 (1994), it has been careful to emphasize post-*Gaworski* that, under *Hicks*, even where the plaintiff has discredited the employer's reasons, the plaintiff cannot prevail unless he has introduced evidence sufficient to show intentional discrimination. *Id.*

defeat judgment as a matter of law or summary judgment. The Eleventh Circuit commented that it did not believe that this Court "intended to remove an entire category of cases from traditional consideration under Fed.R.Civ.P. 50 or 56." *Id.* at 443. The *Isenbergh* court also noted that the most important thing to remember about *Hicks* was that it decided nothing about a Rule 50 case, a jury trial, or a verdict for plaintiff, as those were not the circumstances presented in *Hicks*. *Ibid.* at 442.

The only circuits that have adopted the view consistent with the court of appeal's view in the present case are the Sixth, Seventh, Ninth, Tenth and D.C. Circuits. *See e.g., Ensley-Gaines v. Runyon*, No. 95-1038, 1996 U.S. App. LEXIS 30015, *21-22 (6th Cir. Nov. 20, 1996) (the existence of genuine issues of material fact concerning defendant's reasons makes summary judgment inappropriate); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994) (to defeat summary judgment a plaintiff need only produce evidence to discredit the employer's reason); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) (the factfinder is entitled to infer discrimination from the prima facie case and showing of pretext without anything more); *Randle v. City of Aurora*, 69 F.3d 441, 452 n.17 (10th Cir. 1995) (noting that the entire Tenth Circuit has unanimously adopted the holding that a Title VII plaintiff may defeat summary judgment if he establishes his prima facie case and presents evidence that the defendant's reason was unworthy of belief); *Barbour*, 48 F.3d at 1277 (plaintiff need only establish a prima facie case and introduce evidence sufficient to discredit defendant's reason to allow factfinder to infer discrimination).

It is now clear that a deep and serious division exists among the circuits as to what is necessary to take the ultimate issue of discrimination to a jury. "Whether proof of falsity is the functional equivalent of proof of intentional discrimination is the question that drives the Hicks dispute." Chambers, *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 Alb.L.Rev. 1, 32 (1996). All of the circuits have now addressed the issue, and they are fairly evenly divided on whether more than mere falsity of an employer's proffered reasons and a minimal prima facie showing is necessary to form a factual basis for an inference of intentional discrimination. The petition for writ of certiorari should be granted to resolve this conflict.

II. THE COURT OF APPEALS' DECISION CLEARLY CONFLICTS WITH THIS COURT'S DECISION IN *ST. MARY'S HONOR CENTER V. HICKS*

The court of appeals, reversing the district court, held that a jury could infer the ultimate fact of intentional discrimination based upon its disbelief of DuPont's reasons for the action in question "together with the evidence that supported the prima facie case." [App. 26a]. The court of appeals plainly read *Hicks* too narrowly when it concluded that that opinion would permit such an inferential leap. [App. 13a-14a, 15a-16a]. This is especially true when the question of proof is reviewed, as the district court did here, through the prism of the post-trial motion for judgment. At that point in the process the

procedural burdens of production lack the relevance that they may have had pre-trial. Indeed, once an employer has carried its initial burden of production of evidence of a non-discriminatory purpose, "the *McDonnell Douglas* framework – with its presumptions and burdens – is no longer relevant." *Hicks*, 509 U.S. at 510, 113 S.Ct. at 2749. The process then proceeds to the "new level of specificity" which this Court has denominated as "the greater enterprise of proving that the real reason was intentional discrimination." *Id.* at 516, 517, 113 S.Ct. at 2752. Decidedly, when the case moves to the actual trial stage it should be tried as any other fact question. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715-16, 103 S.Ct. 1478, 1482 (1983).

Thus, when the district court, as in the instant case, reviews the adequacy of a jury verdict on an employer's post-trial motion for judgment, the court must review *all* of the evidence presented at trial. While a jury may rely on inferences to reach its verdict, it remains for the trial court to determine whether any inference is reasonably based on an acceptable level of evidence. In doing so, the district court is not bound by any pre-trial procedural device, but must be guided by the ultimate test, discrimination *vel non*. *Hicks*, 509 U.S. at 518, 113 S.Ct. at 2753.

The fallacy of the court of appeals' decision lies in its misconstruction of the standard set down by this Court in

Hicks. Like most of the lower courts with which it allies itself, the Third Circuit in *Sheridan* focused on the following language in *Hicks*:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "no additional proof of discrimination is *required*." 509 U.S. at 511, 113 S.Ct. at 2749 (citation omitted) (footnote omitted) (emphasis original).

The court of appeals failed to read that passage within the context of the fullness of the opinion. As this Court also noted in *Hicks*, the prima facie case is only a minimal showing, *Hicks*, 509 U.S. at 506, 113 S.Ct. at 2747, "infinitely less than what a directed verdict demands." *Id.* at 515, 113 S.Ct. at 2751. Further, as to pretext, this Court cautioned: "A reason cannot be proved to be a 'pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Ibid.* at 515, 113 S.Ct. at 2752 (emphasis original). *Hicks* clearly mandates that a plaintiff, in constructing her case of pretext and carrying her ultimate burden of persuasion cannot rely on the mere rejection of the employer's proffered reasons.

In this case, the court of appeals would allow a jury to rely on an overreaching inference to find intentional discrimination based only on the disbelief of DuPont's proffered non-discriminatory reasons, aided by the bare and minimal facts underlying the prima facie case.

The bare and minimal facts underlying Sheridan's prima facie case are that she is a woman, she was qualified for the position of head captain, she was constructively discharged, and the position was ultimately filled by a man. [*See* App. 11a, n.5]. As the district court stated, the fact that she was replaced by a man, even together with other evidence which could arguably relate to gender, was insufficient to support a reasonable inference that gender was a motivating factor. [App. 8a]. Indeed, it is telling that the court of appeals did not even mention that Sheridan was replaced by a man in its discussion of the factual issues surrounding this case. [App. 28a-36a]. As the district court noted, even though Sheridan was replaced by a man, two of the four remaining head captain positions were filled by women. [App. 127a].

The conflict with *Hicks* is revealed even further when the specifics of the present case are compared with those of *Hicks*. Based on evidence similar to that presented in *Hicks*, the court of appeals in the instant case rendered the same decision that this Court ultimately reversed in *Hicks*, namely, judgment in favor of the employee. *Hicks*, 509 U.S. at 525, 113 S.Ct. at 2756. As in *Hicks*, the employee in the present case had a good performance record, but then began to have performance problems, was put on probation (in *Hicks* the employee was suspended), an investigation ensued (in *Hicks* there was a letter of reprimand), she was reassigned (in *Hicks* there

was a demotion), and her employment ended in, as the jury found, a constructive discharge (in *Hicks* plaintiff was terminated). [App. 6a, 28a-32a]; *Hicks*, 509 U.S. at 505, 113 S.Ct. at 2746. The legitimate reason for the employment decision proffered in the present case, as in *Hicks*, was based on violations committed by the employee. [App. 31a]; *Hicks*, 509 U.S. at 507, 113 S.Ct. at 2747.

After a full bench trial,[3] the district court in *Hicks* found that the reasons proffered by the employer were not the true reasons for the employee's demotion and discharge. *Hicks*, 509 U.S. at 508, 113 S.Ct. at 2748. The *Hicks* trial court, nevertheless, held that the employee had failed to carry his ultimate burden of proving that race was the true reason for the employment decision. *Id.* The district court found that any disparate treatment of plaintiff in that case was only evidence of personal animosity, not racial discrimination. *Ibid.*

Similarly, in the present case, the district court, after a full jury trial, assumed that the jury had rejected DuPont's reasons. [App. 125a]. It, too, nevertheless, held that plaintiff failed to show that gender was the true cause of the employment action. [App. 126a, 128a]. At most, the district court concluded, the evidence established only that Sheridan may have been treated differently, but not because she was a woman. [App. 126a]. In fact, as in *Hicks*, there was evidence of strong personal animosity towards Sheridan. [App. 69a].

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[3] Since the cause of action under review here was after the 1991 amendments to the Civil Rights Act, this case presents the practical problems of applying *Hicks* to a jury trial.

On this similar evidence, the court of appeals in the present case did exactly what the Eighth Circuit did in *Hicks*, which was to reverse the district court and find in favor of the employee because the employee had, after establishing a prima facie case, discredited the employer's reasons. This Court reversed the Eighth Circuit's decision, determining that simply because the employer's proffered reason may not be legitimate does not mean that the employee's proffered reason of discrimination is correct. *Hicks*, 509 U.S. at 524, 113 S.Ct. at 2756.[4]

In reversing the Eighth Circuit, this Court also discredited the notion, which the court of appeals in the present case adopts, that if an employer does not proffer a reason worthy of belief, "it does so at its own peril." [App. 21a]. This Court squarely addressed the implications to be drawn from disbelief of an employer's reason, stating that a "judgment-for-lying" is an unfair and selective punishment, and that it would be absurd to say that a company which in good faith introduces testimony becomes a liar and perjurer when that testimony is not believed. *Hicks*, 509 U.S. at 520-521, 113 S.Ct. at 2754. Further, this Court stated, that the employer's reasons do not exist apart from the record, but may be found "lurking in the record" just like any other possible nondiscriminatory reason, which may include personal animosity. *Id.* at 522-523, 113 S.Ct. at 2755.

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[4] Of note is the fact that the Eighth Circuit, upon remand from this Court, affirmed the district court's finding in favor of the employer that discrimination did not motivate the employment decision. *Hicks v. St. Mary's Honor Ctr.*, 90 F.3d 285, 291 (8th Cir. 1996).

Thus, contrary to this Court's decision in *Hicks*, the court of appeals in the present case, on similar evidence, held that judgment as a matter of law or summary judgment was precluded. This decision is clearly in conflict with *Hicks*.

This Court fully recognized the important part played by the procedural evidentiary burdens in discrimination cases when the Court attempted to resolve the matter in *Hicks*. Since then, hundreds of lower court decisions have attempted, without a great deal of uniformity, to address the key issues of burdens of production in this type of case. The lack of stable law in this area is what prompted this court to consider *Hicks* in the first place. *Hicks*, 509 U.S. at 512, 113 S.Ct. at 2750. Unfortunately, especially as to the requirement of production of sufficient evidence for a jury to draw an inference of intentional discrimination, this Court's prior pronouncements have proved to be inadequate. The Court should use this case as an opportunity for further guidance to the lower courts, which are directly and deeply divided on this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Filed November 14, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-7509

BARBARA R. SHERIDAN,

Appellant

v.

E.I. DUPONT DE NEMOURS AND COMPANY,
JACQUES AMBLARD

On Appeal from the United States District Court
for the District of Delaware
(D. C. Civil No. 93-cv-00046)

Argued May 4, 1995

Before: SLOVITER, *Chief Judge*, ALITO, *Circuit Judge*,
and SCHWARZER, District Judge*

Reargued en banc May 14, 1996

Before: SLOVITER, *Chief Judge*, BECKER, MANSMANN,
GREENBERG, SCIRICA, COWEN, NYGAARD,
ALITO, ROTH, LEWIS, MCKEE, and
SAROKIN**, *Circuit Judges*

(Opinion Filed November 14, 1996)

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* Hon. William W. Schwarzer, Senior United States District Judge, United States District Court for the Northern District of California, sitting by designation.

** Hon. H. Lee Sarokin heard argument but retired from office prior to the issuance of the opinion.

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OPINION OF THE COURT

SLOVITER, *Chief Judge*.

This appeal offers the en banc court the opportunity to attempt to clarify the quantum and nature of evidence that will permit a jury to find that an employer engaged in impermissible employment discrimination. Although we believe that several of our opinions in recent years accurately and adequately set forth the applicable legal principles, the decision of the district court and that of a panel of this court, now withdrawn, require us to return to the central issue presented here.

I.

Barbara Sheridan, a former employee of E.I. DuPont de Nemours & Co. (DuPont), filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 *et seq.*, charging DuPont and her former supervisor, Jacques Amblard, with several claims of sex discrimination and retaliation. Sheridan, who had been an employee of the Hotel du Pont[1] since 1979 and was at the time her employment ceased one of the Head Captains of the hotel's Green Room, asserted that DuPont discriminated against her on the basis of her sex when it failed to promote her to Manager of Restaurants in 1991 (Count I),

[1] Quixotically, the hotel is not capitalized as is the name of the company. To avoid confusion, we will nonetheless refer to the hotel and the defendant interchangeably as DuPont.

retaliated against her for complaining about sex discrimination by putting her on probation and taking various disciplinary actions against her (Count II), and created intolerable working conditions, culminating in her removal from a supervisory position, which resulted in her constructive discharge (Count III).

After discovery, the defendants moved for summary judgment which the district court denied. The court held that Sheridan had presented a prima facie case of discrimination and sufficient evidence to permit a factfinder to believe that DuPont's reasons for not promoting her, i.e., that she was not qualified for the position of Manager of Restaurants and that she had not applied for the position, were pretexts for discrimination. App. at 57. The court further held that Sheridan had presented adequate evidence to survive summary judgment on her retaliation claim and to enable a factfinder to reasonably believe that her supervisors had intentionally fabricated evidence of poor job performance in order to remove her from her position as Head Captain and offer her less desirable, dead-end jobs. App. at 68. The court concluded that "[i]f plaintiff's version of the facts were accepted by a trier of fact, it would be reasonable for the trier of fact to conclude that resignation was plaintiff's only option." *Id.*

Thereafter, the case proceeded to trial. The conduct that was the subject of Sheridan's claims straddled the period before and after November 21, 1991, the date of the enactment of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), which granted a right to a jury trial on Title VII intentional discrimination claims for which compensatory or punitive damages are sought, *id.* § 1977A(c), 105 Stat. at 1073 (codified at 42 U.S.C.

§ 1981a(c)). The district court ruled that the jury would serve as the finder of fact for Sheridan's claims that were based on conduct that occurred after that date, but that the jury would serve only in an advisory capacity for claims based on events that occurred before that date. This meant that the jury's verdicts on Count I (failure to promote) and the alleged retaliatory acts in Count II that occurred before November 21, 1991 were to be advisory, while the jury was to be the finder of fact for the remaining alleged acts of retaliation and with respect to Count III, Sheridan's claim of constructive discharge.

The trial occupied six days. During the trial, the district court dismissed the claims against Amblard on the ground that an employee cannot be sued under Title VII.

After deliberating, the jury returned special interrogatories. With respect to the promotion claim, the jury found that Sheridan was not qualified for the job of Manager of Restaurants and therefore found against her on her claim of discriminatory failure to promote. With respect to retaliation, the jury found that DuPont had not retaliated against Sheridan for complaining of sex discrimination. In contrast, the jury did find in Sheridan's favor on her claim of constructive discharge. It awarded her $17,500 in compensatory damages, over and above lost wages, but found that DuPont's actions were not taken "with malice or reckless indifference" to her rights, App. at 33, thus precluding Sheridan from receiving punitive damages. *See* 42 U.S.C. § 1981a (b) (1). Finally, the jury found that Sheridan had failed to mitigate her damages by $33,000, that amount to be deducted from the

total amount of lost wages owed. Because the court calculated Sheridan's lost wages to be $51,072, it awarded her $18,072, in addition to six months of front pay totalling $12,768. The district court adopted as its own the jury's findings with respect to the conduct alleged in Counts I and II that took place before November 21, 1991.

Both parties moved for judgment as a matter of law or in the alternative for a new trial. The district court granted judgment in DuPont's favor. The court recognized that DuPont had proffered as one of the principal reasons for the disciplinary actions it had taken against Sheridan her alleged unauthorized "comping," i.e., giving away complimentary food and drinks in violation of the hotel's policy that they should be registered, and Sheridan offered evidence to the contrary, indeed, evidence that she was elsewhere on some of the days that DuPont claimed she was engaged in "comping" at the hotel.

In overturning the jury's verdict on the constructive discharge claim in favor of Sheridan, the court stated that even if the jury could have reasonably rejected the legitimacy of DuPont's investigation of Sheridan's alleged "comping," and thus its reasons for discharging her, "the Court is still left searching the record for evidence that gender played a determinative role in defendant's conduct. . . . The Court . . . has failed to locate sufficient evidence from which the jury could infer such a finding." *Sheridan v. E.I. DuPont de Nemours and Co.*, No. 93-46 (D.

Del. July 14, 1994) at 9.[2] The court ruled that the evidence Sheridan presented which arguably related to her gender, such as the facts that no woman had ever held the position of Manager of Restaurants, that a man replaced Sheridan as Head Captain of the Green Room morning shift, that Amblard had told Sheridan he would watch her like a "hawk" and a "dog," and Amblard's actions in ignoring her and speaking instead to one of her male supervisors if one was present, was even in totality insufficient to support a reasonable inference that gender was a motivating factor in DuPont's actions. *Id.* at 9-10.

The court stated that "[i]n order to demonstrate that gender was a motivating factor, plaintiff would have to point to some evidence that was the motive of those in the decision making process. No such evidence exists in the record." *Id.* at 11-12. The district court accordingly granted DuPont's motion for judgment as a matter of law, and ruled conditionally, pursuant to Fed. R. Civ. P. 50(c), that if the judgment were reversed on appeal, DuPont would be entitled to a new trial "because the jury's

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[2] The district court instructed the jury that it was required to find that Sheridan's gender was the sole cause of her constructive discharge, and the jury apparently found that this standard had been met. After the trial, we held in *Miller v. CIGNA Corp.*, 47 F.3d 586, 597 (3d Cir. 1995) (en banc), that a plaintiff need show only that discrimination was a determinative cause, as opposed to the sole cause, of the employer's challenged action. In ruling on DuPont's motion for judgment as a matter of law, the district court held that the evidence of gender discrimination in Sheridan's case was insufficient even under the *Miller* standard.

verdict is contrary to the weight of the evidence." *Id.* at 12 n.11. Sheridan appealed.[3]

A panel of this court heard argument on May 4, 1995 and issued an opinion that reversed the district court's order granting judgment as a matter of law for DuPont on Sheridan's constructive discharge claim but was divided as to the alternative grant of a new trial, with two judges voting to affirm the grant of a new trial and the third voting to remand the issue whether a new trial was warranted for reconsideration by the district court, using the correct legal principles. *See Sheridan v. DuPont*, No. 94-7509 (Jan. 31, 1996), *vacated*, 74 F.3d 1439 (3d Cir. 1996). The majority and dissenting opinions differed in particular in their interpretation of the effect of the Supreme Court's opinion in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), on the inferences that the finder of fact may draw from its disbelief of the employer's proffered justification for the disciplinary employment action taken against Sheridan and the amount and type of evidence needed to sustain a jury verdict.

Both DuPont and Sheridan petitioned for rehearing and the court voted to hear the appeal en banc. As required by our Internal Operating Procedures, the opinion of the panel issued January 31, 1996 was withdrawn

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[3] Sheridan does not challenge the jury's finding as to her lack of qualifications for the promotion to Manager of Restaurants that was the subject of her Count I. Thus that claim is no longer in issue.

and the court held the en banc argument on May 14, 1996.[4]

II.

DISCUSSION

A.

Legal Issues

The parties disagree both as to the applicable law and the weight of the evidence. DuPont argues that the district court's decision in its favor should have been affirmed in all respects. It apparently recognizes that the district court's finding that Sheridan had not carried her burden of proving that DuPont's decisions were based on gender discrimination was not consistent with this court's prior decisions. Thus, DuPont challenges and requests that we reconsider our prior decisions with respect to the "recurring problem of the shifting burdens" in employment discrimination cases, arguing that our decisions do not fully incorporate the teaching of the Supreme Court in *Hicks*. It singles out in particular the "underlying decision of the Court in [*Fuentes v. Perskie*, 32 F.3d 759 (3d Cir. 1994)]." DuPont's Petition for Rehearing at 5.

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[4] The Equal Employment Opportunity Commission (EEOC), the NAACP Legal Defense and Education Fund, the American Civil Liberties Union of New Jersey, and the National Employment Lawyers Association, all filed briefs as amicus curiae in support of Sheridan's position. Lockheed Martin Corporation filed an amicus brief in support of DuPont.

Sheridan for her part argues that we have correctly interpreted *Hicks* in our post-*Hicks* decisions with respect to the evidence that would permit a plaintiff claiming employment discrimination to prevail, and cites, *inter alia*, *Fuentes*, 32 F.3d 759; *Sempier v. Johnson & Higgins*, 45 F.3d 724 (3d Cir.), *cert. denied*, 115 S.Ct. 2611 (1995); *Waldron v. SL Industries*, 56 F.3d 491 (3d Cir. 1995); and *Brewer v. Quaker State Oil Refining Corporation*, 72 F.3d 326 (3d Cir. 1995).

We thus turn, this time en banc, to reexamine what DuPont calls "this continuing and perplexing problem of interpreting the shifting burden of *Hicks*."

By the time *Hicks* reached the Supreme Court, the required components of a plaintiff's prima facie case of employment discrimination had been established in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 & n.6 (1981),[5] as had been the requirement that the employer was obliged to proffer a nondiscriminatory reason for its adverse employment action, *see McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 254. Also established was the requirement that the burden of persuasion remained at all times with the plaintiff. *See United States Postal Serv. Bd. of Governors v.*

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[5] To establish a prima facie case of discriminatory discharge a Title VII plaintiff must show (1) that she is a member of a protected class, (2) she was qualified for the position, (3) she was discharged, and (4) the position was ultimately filled by a person not of the protected class. *See, e.g., Waldron v. SL Industries*, 56 F.3d 491, 494 (3d Cir. 1995), (citing *McDonnell Douglas* and *Burdine*).

Aikens, 460 U.S. 711, 716 (1983); *Burdine*, 450 U.S. at 256. Still open, however, and the subject of considerable dispute, was the effect of the decision by the trier of fact that the reasons given by the employer were not the real reasons for the adverse employment action. As the Court noted in *Hicks*, there were cases in the courts of appeals that held that a finding of pretext does not mandate a finding of illegal discrimination, *see, e.g., EEOC v. Flasher Co.*, 986 F.2d 1312, 1321 (10th Cir. 1992); *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275, 283 (6th Cir. 1991), *cert. denied*, 503 U.S. 945 (1992), and others that held that a finding of illegal discrimination was mandated on a finding of pretext, *see, e.g., Hicks v. St. Mary's Honor Center*, 970 F.2d 487, 492-93 (8th Cir. 1992), *reversed*, 509 U.S. 502 (1993); *King v. Palmer*, 778 F.2d 878, 879 (D.C.Cir. 1985); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395-96 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984).

In *Hicks*, a case in which the plaintiff had brought a Title VII action alleging that he was demoted and discharged because of his race, the court of appeals had concluded that "[o]nce plaintiff proved all of [the employer's] proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law." 970 F.2d at 492. It was this holding that was reversed by the Supreme Court, which held that judgment for the plaintiff is not *compelled* by the disbelief of the employer's reasons. 509 U.S. at 511. On the other hand, the Court also explicitly stated that a finding that the reasons proffered are pretextual *permits* the factfinder to draw the inference that the defendant intentionally discriminated against the plaintiff. *Id.*

In deciding the "ultimate question" of whether the employer unlawfully discriminated, the Court stated in the following oft-quoted passage that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Id.* The Court explained that "rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination," and continued: "the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is *required*.' " *Id.* (emphasis in original) (quoting *Hicks*, 970 F.2d at 493).[6]

Reading these statements in the context of the Court's opinion, we have understood *Hicks* to hold that the elements of the prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination. Accordingly, in *Fuentes* we explained that "the factfinder may infer from the combination of the plaintiff's prima facie case and its own rejection of the employer's proffered non-discriminatory

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[6] It is not without significance that the four dissenting justices in *Hicks* did not take issue with the majority's acceptance of the sufficiency of a rejected pretext to demonstrate discrimination. Instead, the dissenters would have gone further and construed *Burdine* to hold that once the factfinder rejected the employer's proffered reason, a finding of discrimination for the plaintiff was compelled. *See* 509 U.S. at 532-33 (Souter, J., dissenting).

reasons that the employer unlawfully discriminated against the plaintiff and was merely trying to conceal its illegal act with the articulated reasons." 32 F.3d at 764. It followed that a plaintiff may survive summary judgment (or in this case judgment as a matter of law) if the plaintiff produced sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action. *Id.* ("[T]o defeat summary judgment when the defendant answers the plaintiff's prima facie case with legitimate, non-discriminatory reasons for its action, the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.").

Although we ultimately decided in *Fuentes* that the plaintiff had failed to submit evidence which cast sufficient doubt on his employer's proffered reasons for failure to place him in the position that he sought, application of the same approach in some later cases led us to hold that the plaintiff had satisfied his or her burden and raised an issue to be decided by the trier of fact. Thus, in *Sempier* we reversed the district court's grant of summary judgment for the employer in an Age Discrimination in Employment Act (ADEA) action because Sempier, an executive at an insurance brokerage and consulting firm, had presented sufficient evidence to create a genuine issue of fact as to whether the company's claim that he was forced to retire for poor performance was a pretext for age discrimination. 45 F.3d at 732-33.

Shortly thereafter, in *Waldron*, another ADEA case, we again held that summary judgment for the employer was improper because the evidence raised a factual question as to whether the employer's proffered explanations – that it had discharged the 63-year-old plaintiff due to a company reorganization plan and dissatisfaction with his work performance – was an attempt to conceal age discrimination. *Waldron*, 56 F.3d at 502-03. We viewed the district court's holding as requiring plaintiffs to bear the burden of demonstrating "pretext-plus," a burden we had explicitly rejected in *Fuentes*. *Id.* at 495.

In *Brewer*, we again cited *Fuentes* for the proposition that a plaintiff will survive summary judgment if s/he can produce sufficient evidence that the employer's proffered nondiscriminatory reason for its employment action was not the true reason. 72 F.3d at 331. Finding the evidence in Brewer's case sufficient to permit a jury to believe that the employer's claim of poor performance by the 53-year-old salesman was pretextual, we reversed the district court's entry of summary judgment on Brewer's ADEA claim. *Id.*

The majority of other federal courts of appeals appear to have interpreted *Hicks* in a similar manner to this court's precedent. *See, e.g., Shaw v. HCA Health Servs. of Midwest, Inc.*, 79 F.3d 99, 100 (8th Cir. 1996) (where defendant did not dispute that plaintiff made out a prima facie case and there was evidence that defendant had altered performance evaluations of plaintiff after firing him, "jury was entitled (although not required) to conclude . . . that the reasons given by the hospital for firing [plaintiff] were a pretext for age discrimination"); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) ("As *Hicks*

explained, a factfinder's rejection of the employer's nondiscriminatory reasons, while not sufficient to *compel* a finding of discrimination, nonetheless suffices to *permit* such a finding."), *cert. dismissed*, 116 S.Ct. 1037 (1996); *EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) ("A finding of pretextuality allows a juror to reject a defendant's proffered reasons for a challenged employment action and thus permits the ultimate inference of discrimination."); *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) ("*Hicks* clarified that the only effect of the employer's nondiscriminatory explanation is to convert he inference of discrimination based upon the plaintiff's prima facie case from a mandatory one which the jury *must* draw, to a permissive one the jury *may* draw, *provided* that the jury finds the employer's explanation 'unworthy' of belief."); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994) (to defeat summary judgment, Title VII plaintiff "must only 'produce evidence from which a rational factfinder could infer that the company lied' about its proffered reasons for his dismissal" (citation omitted)); *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993) (plaintiff can defeat summary judgment by "present[ing] evidence sufficient to establish a prima facie case, and . . . show[ing] that there is a genuine dispute of material fact about [the defendant's] proffered explanation" for its action); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) ("[A]s *St. Mary's* recognizes, the factfinder in a Title VII case is entitled to infer discrimination

from plaintiff's proof of a *prima facie* case and showing of pretext without anything more. . . . ").[7]

The Equal Employment Opportunity Commission, the government agency charged with enforcement of the employment discrimination laws and an amicus curiae in this case, has also taken the view "that a prima facie case, coupled with a non-credible justification from the employer, is sufficient to support a finding of discrimination." EEOC Enforcement Guidance on *St. Mary's Honor Center v. Hicks*, EEOC Comp. Man. (BNA), N:3361, 3363 n.3 (Apr. 12, 1994). "As an administrative interpretation

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[7] It is of interest that of the four cases from other circuits cited by the dissent as "strong contrary authority," in three the actual holding was that the plaintiff "failed to present sufficient evidence to permit a reasonable factfinder to infer that [the defendant's] articulated reason was a pretext for unlawful . . . discrimination." *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 262 (1st Cir. 1994); *see also LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 845 (1st Cir. 1993) ("We conclude . . . that a reasonable factfinder could not infer pretext or age discrimination from these circumstances"), *cert. denied*, 114 S.Ct. 1398 (1984); *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996) ("our examination of the record here indicates that Isenbergh failed in creating an issue of fact about the dis-believability of the employer's reason for the hiring decision"). In *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996), which adopts an analysis of *Hicks* that runs counter to the majority of circuits, the court nonetheless found that based on the evidence that the reason given by the employer was false, "the jury was entitled to find that the reasons given for [plaintiff's] discharge were pretexts for age discrimination" and "[v]iewing this evidence in the light most favorable to [plaintiff], a reasonable jury could have found that [the employer] discriminated against [the plaintiff] on the basis of his age." *Id.* at 996.

of the Act by the enforcing agency, these Guidelines, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986) (internal quotation marks and citations omitted).

The attack by DuPont and the dissent on the paradigm we and these other courts have constructed in the wake of *Hicks* is multi-faceted. DuPont suggests that there is an inconsistency between this court's caselaw, as applied or articulated, and the requirement that the ultimate burden of persuasion of intentional discrimination must rest with the plaintiff. We find no such inconsistency. More important, the Supreme Court itself in *Hicks* expressly stated that its various statements in that opinion as to the burden that plaintiff must bear, i.e. "it is not enough . . . to *dis*believe the employer," 509 U.S. at 519, and the plaintiff must show *"both* that the reason was false, *and* that discrimination was the real reason," *id.* at 515, were not inconsistent with the statement in the opinion that "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination," *id.* at 511. *Hicks* explained that the statement that "rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination" was not inconsistent with its placement of the burden of persuasion on the plaintiff because *"there must be a finding of discrimination." Id.* at 511 n.4 (emphasis throughout discussion in original). Thus, the Supreme Court has answered the very claim of inconsistency DuPont purports to find in our interpretation of *Hicks*.

Similarly unpersuasive is the dissent's suggestion that *Fuentes* impermissibly gives continuing weight to the presumption of discrimination created by the prima facie case even after the *McDonnell Douglas* presumption has dissipated or "burst." This argument is based on the mistaken assumption that once the presumption of discrimination created initially by the prima facie case "drops from the case," *Burdine*, 450 U.S. at 255 n.10, the underlying facts lose their probative value. However, the Supreme Court specifically explained in *Burdine* that "[i]n saying that the presumption [of discrimination] drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. . . . [T]his evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual." *Id.* As long as the jury must make a finding of intentional discrimination, there is no reason why the evidence that supported the prima facie case coupled with the jury's determination that the employer's proffered explanations are pretextual is not sufficient to support a verdict of discrimination.

As Chief Justice, then Justice, Rehnquist earlier had explained, the initial presumption of discrimination arises from the plaintiff's prima facie case of discrimination "because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). He continued:

> [W]e are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Id.

This court has previously noted the probative significance of the factfinder's disbelief in a proffered explanation by a party, stating:

> It has always been understood – the inference indeed is one of the simplest in human experience – that a party's *falsehood* or *other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit.

McQueeney v. Wilmington Trust Co., 779 F.2d 916, 921-22 (3d Cir. 1985) (quoting 2 Wigmore § 278(2) (Chadbourne Rev. 1979)). As another court recently remarked in the context of an employment discrimination case: "Resort to a pretextual explanation is, like flight from the scene of a crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct." *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 200 (2d Cir. 1995).

We presume that the same logic, albeit unarticulated, was the basis for the Supreme Court's statement in *Hicks* that disbelief of the employer's reason will permit the factfinder to infer the ultimate fact of discrimination, 509 U.S. at 511, even though the presumption of discrimination "drops from the case" after the employer proffers a legitimate reason for its actions, *Burdine*, 450 U.S. at 255 n.10.

We routinely expect that a party give honest testimony in a court of law; there is no reason to expect less of an employer charged with unlawful discrimination. If the employer fails to come forth with the true and credible explanation and instead keeps a hidden agenda, it does so at its own peril. Under those circumstances, there is no policy to be served by refusing to permit the jury to infer that the real motivation is the one that the plaintiff has charged.

The dissent concedes that in the usual case after the presumption created by the prima facie case has dissipated and sufficient evidence of pretext has been adduced, there will be sufficient evidence to support a verdict of discrimination. The dissent is concerned that in the atypical case this may not be so. It posits the situation of a plaintiff who claims multiple grounds, all illegal, for the employment action. We see no reason to engage in a dialogue of speculation as to how to treat such a case, divorced from a factual record, particularly because the situation presented by the dissent was not the case in *Hicks*, where the plaintiff claimed race discrimination, was not the case in *Fuentes*, where the plaintiff claimed national origin discrimination, nor is it the case before us now, where Sheridan claims only sex discrimination.

The other situation posited by the dissent for its unwillingness to join the otherwise unanimous en banc court is that created where an employer "may not wish to disclose his real reasons for not promoting B . . . over A." Dissenting Op. at 48 n.8. The persistence in maintaining that the employment action was taken because the plaintiff was unqualified or the position was being eliminated due to a reduction in force when the employer knows that the real reason is nepotism would violate the spirit if not the language of Rule 11 of the Federal Rules of Civil Procedure. The dissent gives no reason why a plaintiff alleging discrimination is not entitled to the real reason for the personnel decision, no matter how uncomfortable the truth may be to the employer. Surely, the judicial system has little to gain by the dissent's approach.

The Supreme Court has stated that an employer can meet its burden of articulating the reason for its action only through the introduction of admissible evidence. *Burdine*, 450 U.S. at 255 n.9. Burden-shifting is designed "to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 255 n.8. It follows that the *Burdine* analysis is rooted in the requirement that when the employer advances through admissible evidence the reasons for its actions, those must be its legitimate reasons.

The dissent argues that mere disbelief of the employer's articulated reason is not enough to sustain a verdict. Of course *Hicks* did not rely merely on the fact-finder's disbelief of the explanation proffered by the employer to uphold a verdict for the employee. Instead, as we have noted, under *Hicks* it is the combination of the disbelief in the employer's proffered explanation, the

evidence that supported finding a prima facie case, *and* the jury's finding of intentional discrimination following a proper instruction to that effect.

Although the dissent states at the outset that its approach "does not mean that a plaintiff, in order to reach the trier of fact, must always prove *'pretext plus,' i.e.*, that the plaintiff must always produce *some evidence* in addition to what is necessary to establish a prima facie case and to show that the employer's explanation is pretextual," Dissenting Op. at 34 (emphasis added), the dissent's approach would bring the courts of this circuit back to the confusion and uncertainty created by the "pretext plus" and "some evidence" language that prompted this court to consider this case en banc.

In Sheridan's case, the district court had reviewed the evidence presented in connection with DuPont's motion for summary judgment and found that Sheridan had made out a prima facie case for gender discrimination culminating in constructive discharge.

Also, the district court had carefully instructed the jury on the need to find intentional discrimination before it could return a verdict for Sheridan on any of her claims. Early in its charge the court had advised the jury that this case involves "allegations of intentional sexual discrimination, that is, of intentionally treating some people less favorably than others because of their gender." App. at 111. Again, in connection with the constructive discharge count the court had reminded the jury that Sheridan must prove "by a preponderance of the evidence that 1) defendant intentionally made plaintiff's

working conditions so intolerable that a reasonable person would feel forced to resign; 2) plaintiff's gender was the sole motivating factor in the defendant's conduct; and 3) plaintiff, in fact, resigned." App. at 123. The jury's verdict signifies that it rejected DuPont's proffered reasons for its employment action and believed that the real reason was discrimination.

In granting judgment as a matter of law for DuPont, the district court stated that "plaintiff would have to point to *some evidence* " that gender was the motive of those in the decision making process. It is evident that the district court believed that something more was required than was set forth in *Hicks* and our cases. Not only was such a requirement of additional evidence rejected in *Fuentes* where we stated that "if the plaintiff has pointed to evidence sufficiently to discredit the defendant's proffered reasons, to survive summary judgment the plaintiff need not also come forward with additional evidence of discrimination beyond his or her prima facie case," 32 F.3d at 764, but it is also inconsistent with the statement in *Hicks* that upon rejection of the defendants' proffered reasons for the action, "no additional proof of discrimination is *required*." 509 U.S. at 511 (internal quotation marks omitted).

As the Supreme Court has noted, "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). We have recognized that "[d]iscrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered." *Jackson v. University of Pittsburgh*, 826 F.2d 230, 236 (3d

Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988). Cases charging discrimination are uniquely difficult to prove and often depend upon circumstantial evidence. *See, e.g., Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-82 (3d Cir. 1996); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir.) (en banc) *cert. dismissed*, 483 U.S. 1052 (1987); *Dillon v. Coles*, 746 F.2d 998, 1003 (3d Cir. 1984). "This is true in part because . . . discrimination . . . is often subtle." *Chipollini*, 814 F.2d at 899. "[A]n employer who knowingly discriminates . . . may leave no written records revealing the forbidden motive and may communicate it orally to no one." *Id.* (quoting *LaMontagne v. American Convenience Prods.*, 750 F.2d 1405, 1410 (7th Cir. 1984)).

The distinct method of proof in employment discrimination cases, relying on presumptions and shifting burdens of articulation and production, arose out of the Supreme Court's recognition that direct evidence of an employer's motivation will often be unavailable or difficult to acquire. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("[T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the plaintiff has his day in court despite the unavailability of direct evidence." (internal quotation marks omitted)); *see also International Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977)

(recognizing that burden-shifting rules "are often created . . . to conform with a party's superior access to the proof"); *Chipollini*, 814 F.2d at 897; *Dillon*, 746 F.2d at 1003.

Thus, it is not only disbelief in the employer's proffered reason that would suffice to sustain the plaintiff's case, as the dissent argues. It is the jury's determination that the reason given was pretextual together with the evidence that supported the prima facie case that will sustain a finding of intentional discrimination made after a proper charge.

The role of determining whether the inference of discrimination is warranted must remain within the province of the jury, because a finding of discrimination is at bottom a determination of intent. In making that finding, the jury must perform its traditional function of assessing the weight of the evidence, the credibility of the witnesses through observation of both direct testimony and cross-examination at trial, and the strength of the inferences that can be drawn from the elements of the prima facie case and the evidence that undermines the employer's proffered reasons for its actions. This is uniquely the role of the factfinder, not the court. *See Barber v. CSX Distribution Servs.*, 68 F.3d 694, 700 (3d Cir. 1995) ("Evaluation of witness credibility is the exclusive function of the jury, and where the only evidence of intent is oral testimony, a jury could always choose to discredit it." (quoting *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 262 (3d Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989))); *see also Aikens*, 460 U.S. at 716 ("It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else." (quoting *Edgington v. Fitzmaurice*,

29 Ch. Div. 459, 483 (1885)); *Chipollini*, 814 F.2d at 899 ("The issue of the defendant's intent at the time of the plaintiff's discharge is clearly a factual question.").

This does not mean that the courts in discrimination cases lose their traditional obligation, when faced with a motion for judgment as a matter of law, to review the adequacy of the showing presented to the factfinder. The district court must determine whether the plaintiff has cast sufficient doubt upon the employer's proffered reasons to permit a reasonable factfinder to conclude that the reasons are incredible, and our previous cases have explained in detail the plaintiff's burden in this regard. *See, e.g., Fuentes*, 32 F.3d at 764-65 ("[T]he non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence. . . . ' " (quoting *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 531 (3d Cir. 1992), *cert. denied*, 510 U.S. 826 (1993))). But once the court is satisfied that the evidence meets this threshold requirement, it may not pretermit the jury's ability to draw inferences from the testimony, including the inference of intentional discrimination drawn from an unbelievable reason proffered by the employer.

With these legal principles before us, we turn to the district court's order granting judgment for DuPont as a matter of law on Sheridan's jury verdict that she was constructively discharged as a result of discrimination. We exercise plenary review of the district court's order granting DuPont's motion for judgment as a matter of

law. *Seman v. Coplay Cement Co.*, 26 F.3d 428, 431 (3d Cir. 1994).

B.

Factual Issues

We need not recount all of the evidence adduced at the trial because we examine the record with the limited purpose of ascertaining whether there was sufficient evidence to withstand judgment as a matter of law. In doing so, we must look at the evidence in the light most favorable to Sheridan, the verdict winner, and draw all reasonable inferences in her favor. *See Hofkin v. Provident Life & Accident Ins. Co.*, 81 F.3d 365, 369 (3d Cir. 1996).

At the time of the events that formed the basis of this case, Sheridan was one of five head captains at the hotel, occupying the position of Head Captain of the Green Room for the breakfast and lunch shifts. Sheridan, who began working at the hotel as a part-time waitress in 1979, reached that supervisory position in 1989 following a series of steady promotions. In addition to those promotions, Sheridan had received numerous commendations for her job performance.

Focusing on the period immediately before that at issue, there was evidence that in May 1989 Sheridan was nominated by her peers and received an "Employee of the Quarter Award" for "outstanding" work. She received merit raises in May 1990 and February 1991. In July 1990 she received a "Way to Go" award from the Personnel & Administrative Services Division for "going

beyond the call of duty." DuPont's October 29, 1990 performance review, signed by two supervisors including defendant Jacques Amblard, rated Sheridan overall "very good," the second highest rating. She was rated "outstanding" for "Interpersonal Relationships," "Planning/Organizing," and "Problem-Solving." Although that report noted that "[a]s a team player, strengthening is needed to improve the overall relationship with the rest of the operation," the report listed one of her strengths as "[v]ery good guest relations, organized." The report stated that "Barbara's persistence has paid off by guest loyalty, staff does not call off sick, and overall very good morale from the support team." Even Sheridan's lowest mark, given for "Attendance/Punctuality/Dependability," was "Satisfactory." App. at 197-98.

In December 1990, Sheridan won a $1,000 accomplishment award. The letter informing her of the award referred to her as "a role model" and "a true ambassador for the company." App. at 151. Other restaurant employees received awards ranging from $200-$500, but Sheridan was the only employee to receive an award as high as $1000. App. at 287. In January 1991, Sheridan was chosen as one of about 20 DuPont employees to appear in a company video. App. at 734. On October 1, 1991, Sheridan received a promotion and salary increase.

DuPont attempted to paint a different picture to the jury. Notwithstanding the record evidence of promotions and commendations, it contended that Sheridan's performance began to deteriorate in early 1991. DuPont produced evidence that supervisors met with Sheridan, expressed dissatisfactions, and directed her to improve in various categories. For example, in February 1991, Ed

Barba, then the Green Room's Manager, listed "corrective measures" that Sheridan should take, including "maintaining an accurate cover count sheet" to insure that "covers" (customers) were distributed fairly among the staff, following the "grooming policy" which required that she report to work on time and in full dress, and refraining from using the Green Room as a break room and for smoking. App. at 228. Nicholas Waller testified that in the summer of 1991, as Manager of Restaurants, he met with Sheridan to discuss alleged complaints that Sheridan had asked Green Room employees to help her with personal tasks, such as parking her car, giving her a wake-up call, or taking her personal mail to the post office, and that she had rewarded employees who complied by giving them additional "covers" in the dining room. App. at 960-63.

On October 17, 1991, Jeff Maisel, by then the Manager of Restaurants, met with Sheridan to discuss problems allegedly perceived with her performance, including tardiness and continuing disregard for the hotel's grooming policy. App. at 206, 885. On November 10, 1991, Maisel placed Sheridan on probation, ostensibly on the ground that she had not corrected her performance. Maisel warned Sheridan that her failure to follow the hotel's policies could result in her termination. App. at 208.

In support of its claim of Sheridan's inadequate performance, DuPont introduced various notes and records that DuPont had compiled of specific infractions by Sheridan. Illustrative of DuPont's complaints is a memo by Barba to the file that on one occasion he had observed Sheridan smoking in the Green Room Bar and putting on makeup. A report meticulously listed other details to

support placing Sheridan on probation.[8] DuPont contended that even while Sheridan was on probation, she continued her inadequate performance.[9]

An important part of DuPont's defense for its employment actions centered on its claim that Sheridan had engaged in "comping," i.e., giving away complimentary food and drinks without ringing up complimentary checks. The hotel began investigating Sheridan for this activity in late February, 1992, and its record of the investigation lists statements of numerous co-workers. App. at 222-26. James Dougherty, a bartender who was one of DuPont's principal witnesses on "comping," reported to DuPont that due to his concerns about numerous "discrepancies" and "cash handling problems" with Sheridan, he began to keep track of the amount of free liquor Sheridan gave away. He recorded that it totaled $921.75 from November 1, 1991 to February 18, 1992, with $417.25

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[8] These included, for example, for a short period in 1991: Oct. 20: Sheridan arrived at work 45 minutes late and without her makeup on, in violation of grooming policy; Oct. 22: reported to work 25 minutes late; Oct. 23: reported to work 20 minutes late; Nov. 3: was 17 minutes late, and not wearing makeup; Nov. 3: Sheridan was observed with another employee in the company van during a staff meeting; Nov. 7: Sheridan was seen eating and smoking in the Green Room Bar with another employee during service hours. App. at 206.

[9] Specifically, DuPont contends that in February 1992, Sheridan spoke rudely at a staff meeting to Joe Marshall, the Room and Service Head Captain. It also presented evidence that once when Sheridan was asked to work on a Sunday, she initially refused, but then agreed to work, although she allegedly told Maisel that "[s]he felt after 13 years she deserved to work Monday-Friday." App. at 220.

worth of drinks given away in December alone. App. at 222. Dougherty testified at trial that each time he saw Sheridan serve a free drink, he would record the date and dollar amount of the drink, and claimed that his dates were about "98-percent accurate." App. at 688.

Maisel testified that based on the hotel's internal investigation, DuPont decided that Sheridan should be reassigned to a non-supervisory position that would not require her to handle cash. App. at 910. Sheridan was offered three options: front desk receptionist, banquet server, or health club attendant, with no diminution of salary. The hotel claimed that she would be eligible for advancement in any of those positions, although Sheridan offered evidence at trial that suggested otherwise. *See* App. at 473-75, 776. After considering the offer for some weeks, Sheridan resigned.

Sheridan's testimony at trial portrayed the events differently than did DuPont. It was her position that the alleged dissatisfaction with her performance stemmed from her complaint of sex discrimination which she made in the fall of 1991, when the hotel reorganized its structure to eliminate the individual restaurant managers and to place a new manager over all of the restaurants in the hotel. The hotel did not advertise the position, considered only five of its own employees for the new post (all men), and selected Maisel. DuPont did not consider Sheridan for the position, *id.*, and Sheridan complained to Amblard at least three times in the period of September and October 1991 that she was not promoted due to gender discrimination. App. at 51-52. She also testified that around this time, Amblard told her repeatedly that he planned to watch her "like a dog" and "like a hawk." App. at 748.

Sheridan's position was that the hotel's recordkeeping of details of her daily activity was "nitpicking" in retaliation for her complaints of sex discrimination. App. at 1337. She further sought to portray Amblard as a sexist and testified that, when she was with one of the other male supervisors, he would ignore her and instead speak only to the man. App. at 748.

In addition to the affirmative evidence of her own accomplishments, Sheridan presented evidence at trial that was directed to impeaching the credibility of DuPont's witnesses, particularly, but not limited to, Dougherty and Maisel. Sheridan demonstrated that for two weeks in January 1992, during which Dougherty listed three dates when she allegedly dispensed free drinks, she had reported for jury duty at the Superior Court. App. at 173-79, 540-43. Even a document handwritten by Maisel showed that another head captain was scheduled to cover Sheridan's shift on those days. App. at 167. Maisel's schedule also indicated that Sheridan was not scheduled for work on December 23 and 24, 1991, although Dougherty's list included these dates among those when Sheridan allegedly required him to deliver complimentary drinks. App. at 167, 227, 540. In fact, Maisel's written work schedule could be viewed as contradicting Dougherty's list as to seven separate dates.

In seeking to show the pretextual nature of DuPont's articulated reasons, Sheridan noted, *inter alia*, the temporal proximity of her complaints to Amblard of sex discrimination and his statements that he would watch her like a "hawk" to the subsequent surfacing of dissatisfaction with her performance, the meticulous recordkeeping

of the details of her daily activities, and the hotel's investigations into her alleged "comping."

Thus, it is clear that the jury in this case was faced with evidence on both sides of the issues raised by the parties. The jury's verdict for Sheridan on her constructive discharge claim shows that the jury accepted Sheridan's view on this claim and rejected DuPont's explanation as pretextual.

We have previously cautioned that "[i]n determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version." *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993). A reasonable jury could have disbelieved DuPont's proffered reasons for its actions based on Sheridan's evidence and its rejection of the credibility of certain of DuPont's principal witnesses, such as Dougherty and Maisel. We find no paucity of evidence on which the jury could have based its finding for Sheridan on her constructive discharge claim.

Under the applicable law, a plaintiff who voluntarily resigned may maintain a case of constructive discharge when the employer's allegedly discriminatory conduct creates an atmosphere that is the constructive equivalent of a discharge. *See Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1079 (3d Cir. 1992). We apply an objective test to determine whether "the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074,

1084 (3d Cir. 1996) (quoting *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir. 1984)).

In denying DuPont's motion for summary judgment, the district court rejected DuPont's argument that there was no basis on which a jury could find that the conditions to which Sheridan claimed she was subjected could have reached the level that would constitute a constructive discharge. Instead, the court held that if Sheridan's version of the facts were accepted by a trier of fact, it would be reasonable for the trier of fact to conclude that resignation was Sheridan's only option. Thus, when the court instructed the jury, it charged that for the jury to find that DuPont constructively discharged Sheridan, she must have proved by a preponderance of the evidence that DuPont "intentionally made [her] working conditions so intolerable that a reasonable person would feel forced to resign" and that "[Sheridan's] gender was the sole motivating factor in the defendant's conduct." App. at 1487.

The evidence of the series of investigative activities, allegations of improprieties, placement on probation after more than a decade of satisfactory performance, and the ultimate removal of Sheridan from her supervisory position in the highly reputed Green Room to one of three far less prestigious dead-end positions, such as the health club attendant, could have been viewed by the jury as meeting the criteria of a constructive discharge. The jury returned an unqualified verdict finding that DuPont had constructively discharged Sheridan and did so based on her gender. We cannot hold that Sheridan failed to present sufficient evidence to withstand DuPont's motion for

judgment as a matter of law, and therefore will reverse the district court's order to that effect.

C.

Grant of a New Trial

Because the district court's ruling focused primarily on its decision to grant DuPont's motion for judgment as a matter of law, the court's explanation for its grant of a new trial was brief. The court noted in a footnote that it was obliged under Fed.R.Civ.P. 50(c) to make a conditional ruling on the defendant's motion for a new trial. To comply with that requirement, the court stated merely that it "would grant the motion for a new trial because the jury's verdict is contrary to the weight of the evidence." *Sheridan* (July 14, 1994) at 12 n.11.

We are unable to ascertain the extent to which this ruling was affected by the court's misconception that direct evidence of discriminatory intent was necessary to sustain the jury's verdict, i.e., its understanding that "[i]n order to demonstrate that gender was a motivating factor, plaintiff would have to point to some evidence that that was the motive of those in the decision-making process." D. Ct. Opinion at 11-12. Because such evidence is not a prerequisite to a finding of intentional discrimination, we believe the district court should reconsider whether a new trial is warranted in light of the correct legal principles.

It is also unclear whether the district court applied the complete test for ruling on a new trial motion. In granting that motion, the district court merely concluded

that the jury's verdict was contrary to the weight of the evidence. Although we recognize that a new trial may be granted even if the evidence is legally sufficient to support the verdict, *Roebuck v. Drexel Univ.*, 852 F.2d 715, 735-36 (3d Cir. 1988), we have nonetheless cautioned that a district court should grant a new trial on the basis that the verdict was contrary to the weight of the evidence "only where a miscarriage of justice would result if the verdict were to stand," *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1352 (3d Cir. 1991). We have explained that this stringent standard is necessary "to ensure that a district court does not substitute its 'judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of facts.' " *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 211 (3d Cir. 1992) (quoting *Lind v. Schenley Indus. Inc.*, 278 F.2d 79, 90 (3d Cir.) (en banc), *cert denied*, 364 U.S. 835 (1960)), *cert. denied*, 507 U.S. 921 (1993).

Therefore, before imposing on Sheridan the burden and expense of a new trial, we will remand to require the district court to determine whether, inasmuch as Sheridan was not obliged to produce direct evidence of discriminatory intent, the jury's verdict for Sheridan was against the great weight of the evidence and would effect a miscarriage of justice.

We have previously remarked that the district court's instruction to the jury placed on Sheridan a higher burden of proof than our cases require. *See* note 2, *supra*. If there were a new trial, Sheridan would not have to prove

that discrimination was the sole cause of DuPont's action but only that discrimination was a motivating factor in its decision. *See Miller v. CIGNA Corp.*, 47 F.3d 586 (3d Cir. 1995) (en banc).

Sheridan has raised other trial errors to support her motion for a new trial, but we need consider briefly only one. Sheridan argues that the district court erred in excluding testimony of a female co-worker that Amblard stated, after watching a woman in a tight dress walk by, that he "would like to grab that," App. at 699-700, 1520, and that on another occasion Amblard rejected her offer to park cars at the hotel on the ground that she could not park cars because she was a woman. App. at 1521. The district court excluded this testimony under Federal Rules of Evidence 401 and 403, finding these statements "prejudicial and irrelevant." App. at 44. We review a district court's rulings concerning the admission of evidence for abuse of discretion. *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188, 191 (3d Cir. 1994).[10] Although Amblard's comments would be relevant to determining whether he was biased against women generally and therefore the district court took too narrow a view in holding that they had *no* probative value, we cannot conclude that the

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[10] We are concerned that the district court failed to make explicit its reasoning under Rule 403, but we regard the required Rule 403 balancing as implicit in its ruling and therefore apparent from the record. *See United States v. Himmelwright*, 42 F.3d 777, 781 (3d Cir. 1994). We note that we will not do so routinely, and expect that the requirements of the Federal Rules will be followed by the courts in this circuit. Should there be a new trial, the district court will have the opportunity to reconsider this ruling.

district court abused its discretion in deciding that Amblard's statements were more prejudicial than probative of the ultimate issue of whether DuPont's employment actions as to Sheridan were caused by gender-based animus. We turn then to the final issue before us,[11] the court's dismissal of Amblard as a defendant.

D.

Individual Liability Under Title VII

Sheridan contends that the district court erred in dismissing Jacques Amblard as a defendant on the ground that individual employees may not be held liable under Title VII.

Title VII provides, in relevant part:

> It shall be an unlawful employment practice for an *employer* –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e-2(a) (emphasis added). The statute defines "employer" as "a person engaged in an industry

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[11] Sheridan has failed to preserve her claim that other testimony by another co-worker was improperly excluded. We also reject her claim based on defense counsel's use of a peremptory strike allegedly based in part on the age of a 68-year-old black member of the jury venire and her claim that defense counsel improperly vouched for the credibility of certain witnesses during closing argument to the jury.

affecting commerce who has fifteen or more employees . . . and any agent of such a person." *Id.* § 2000e(b).

Sheridan argues that there is no language in the statute excluding individuals, and she looks to the law of agency to support the proposition that agents can be held jointly liable with employers for wrongs resulting from their tortious conduct. She also contends that we should interpret the 1991 amendments, which added to the remedies provided in Title VII a provision for compensatory and punitive damages, as suggesting that Congress intended to hold individual defendants liable because, unlike equitable remedies such as reinstatement which are uniquely available from an employer, these newly available monetary remedies can be forthcoming from an employee.

These arguments are not without some force. However, the clear majority of the courts of appeals that have considered this question have held that individual employees cannot be held liable under Title VII. *See Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-17 (2d Cir. 1995); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C.Cir.), *cert. denied*, 116 S.Ct. 569 (1995); *Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir.), *cert. denied*, 115 S.Ct. 574 (1994); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994). Others appear to lean in that direction, *see, e.g.*, *Lenhardt v. Basic Inst. of Technology, Inc.*, 55 F.3d 377 (8th Cir. 1995) (interpreting parallel state statute to preclude employee liability); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510-511 & n.1) (4th Cir.) (deciding issue under ADEA as to "personnel decisions of a plainly delegable character"), *cert. denied*, 115 S.Ct. 666 (1994), while others

have either permitted liability in an employee's official capacity only, *see Cross v. Alabama*, 49 F.3d 1490, 1504 (11th Cir. 1995); *Garcia v. ELF Atochem North America*, 28 F.3d 446, 451 n.2 (5th Cir. 1994), or left the issue an "open question," *Ball v. Renner*, 54 F.3d 664, 668 (10th Cir. 1995).

In our independent examination of this issue, we find most significant the fact that when Congress amended the statute in 1991 to provide a detailed sliding scale of damages ranging from $50,000 for an employer of more than 14 and fewer than 101 employees, to $300,000 for employers with more than 500 employees, 42 U.S.C. § 1981a(b)(3), it made no reference as to the amount of damages, if any, that would be payable by individuals. This strongly suggests that Congress did not contemplate that such damages would be assessed against individuals who are not themselves the employing entity. *See Tomka*, 66 F.3d at 1315; *Maxwell's*, 991 F.2d at 587 n.2; *Ascolese v. Southeastern Pa. Transp. Auth.*, 902 F. Supp. 533, 540 (E.D.Pa.1995), *modified on other grounds*, 925 F. Supp. 351 (1996).

Moreover, we note that Congress had previously expressed its concern about the impact of Title VII litigation on small businesses when it excluded businesses with fewer than fifteen employees from the definition of an "employer." It is reasonable to infer that Congress's concern in that regard applies as well to individuals. *See Williams*, 72 F.3d at 553; *Tomka*, 66 F.3d at 1314 (citing remarks of legislators indicating concern with burdens imposed upon small businesses forced to defend against Title VII suits); *Miller*, 991 F.2d at 587.

For these reasons, as well as some of the others cited by the other circuits, we are persuaded that Congress did not intend to hold individual employees liable under Title VII.

III.

CONCLUSION

For the foregoing reasons, we will reverse the district court's entry of judgment in DuPont's favor on the constructive discharge claim, and remand to the district court to reconsider DuPont's motion for a new trial.

ALITO, *Circuit Judge*, concurring in part and dissenting in part.

I join part IID of the opinion of the court. I also agree with the court's disposition of the plaintiff's evidentiary argument. *See* Maj. Op. 27-28. I dissent, however, from parts IIA – C of the court's opinion.

I.

My primary disagreement with the majority concerns the test for determining whether a defense motion for summary judgment or judgment as a matter of law should be granted in an employment discrimination case governed by the procedural scheme sanctioned in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Like several other courts of appeals (*see* Maj. Op. 11-12), the majority here holds that when the plaintiff has made out a prima facie case and has offered enough evidence to support a finding that the explanation was pretextual, a defense motion for summary judgment or judgment as a

matter of law must *always* be denied. However, there is strong contrary authority, which the majority does not acknowledge. The *in banc* Fifth Circuit, by a vote of 16 to 1, has rejected the majority's position. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (*in banc*). So have the First and Eleventh Circuits. *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 442-43 (11th Cir. 1996); *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260-61 n.3 (1st Cir. 1994); *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 842-43 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 1398 (1994). I believe that these other courts have analyzed the question more accurately than the majority has here.

If the majority had merely said that, under the circumstances described above, a defense motion for summary judgment or judgment as a matter of law must *generally* be denied, I would agree. When a plaintiff makes out a prima facie case and there is sufficient evidence in the record to permit a rational trier of fact to find that the employer's explanation is untrue, a defense motion for summary judgment or judgment as a matter of law should *usually* be denied. But *not always*, as the majority contends.

In my view, the correct test is the following: a defense motion for summary judgment or judgment as a matter of law should be granted when the evidence in the record could not persuade a rational trier of fact that intentional discrimination on the ground alleged by the plaintiff was a determinative cause of the challenged employment action. This does not mean that a plaintiff, in order to reach the trier of fact, must always prove "pretext plus," *i.e.*, that the plaintiff must always produce some evidence in addition to what is necessary to establish a prima facie

case and to show that the employer's explanation is pretextual.[1] On the contrary, in most cases, such additional proof is not needed. But I disagree with the majority that proof of the elements of the prima facie case and proof of pretext are *always* enough.

II.

A. The key to the question at issue lies in the nature of the "presumption" of discrimination that arises when the plaintiff establishes the elements of a prima facie case. In *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), the Court explained that the "[e]stablishment of the prima facie case in effect creates a presumption that the employer discriminated against the employee." This presumption "places upon the defendant the burden of producing an explanation to rebut the prima facie case – *i.e.*, the burden of producing evidence that the adverse employment actions were taken 'for a legitimate nondiscriminatory reason.' " *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993), (quoting *Burdine*, 450 U.S. at 254). But while this presumption shifts the burden of production to the defendant, " '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' " *Hicks*, 509 U.S. at 507 (quoting *Burdine*, 450 U.S. at 253). "In this regard," *Hicks*

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[1] *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 535 (1993) (Souter, J., dissenting); Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the 'Pretext-Plus' Rule in Employment Discrimination Cases*, 43 Hastings L.J. 57, 81-83 (1991) (explaining the "pretext plus" rule).

observed, "it operates like all presumptions, as described in Federal Rule of Evidence 301." 509 U.S. at 507.

Critical for present purposes is what happens when the defendant satisfies its production burden. *Burdine* addressed this question in the following passage:

> If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted,[10] and the factual inquiry proceeds to a new level of specificity.
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> 10. See generally J. Thayer, *Preliminary Treatise on Evidence* 346 (1898). In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. . . .

450 U.S. at 255 & n.10.

Hicks similarly explained that, if the defendant meets its production burden, "the *McDonnell Douglas* framework – with its presumptions and burdens – is no longer relevant" and should not be "resurrect[ed.]" 509 U.S. at 510. "The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture," and "the trier of fact

proceeds to decide the ultimate question: whether plaintiff has proven that the defendant intentionally discriminated against him [on the ground alleged.']" *Hicks*, 509 U.S. at 510-11 (quoting *Burdine*, 450 U.S. at 253).

B. I interpret these passages to mean that the *McDonnell Douglas* presumption is governed by the "bursting bubble" theory associated with Professor James Bradley Thayer. *See 2 McCormick on Evidence* § 344 at 462 (4th ed. 1992). Under this theory, "the only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact. If that evidence is produced by the adversary, the presumption is spent and disappears." *Id.* The case then proceeds "as though there had never been a presumption at all." 1 *Weinstein's Evidence* ¶ 300[01] at 300-4 (1996) (footnote omitted).

That *Burdine* and *Hicks* regarded the *McDonnell Douglas* presumption as governed by this theory is suggested by the following. First, *Burdine* states that the term "presumption" properly " 'refers *only* to a device for allocating the production burden,' " 450 U.S. at 254 n.8 (emphasis added) (citation omitted) – the orthodox "bursting bubble" view. Second, both *Burdine* and *Hicks* employ classic "bursting bubble" language to describe what happens to a presumption if the defendant satisfies its production burden: the presumption then "drops from the case,"[2] "drops out of the picture,"[3] is "no longer

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[2] *Burdine*, 450 U.S. at 254 n.10.

[3] *Hicks*, 509 U.S. at 511.

relevant,"[4] and should not be "resurrect[ed]."[5] Third, *Burdine*'s footnote 10, which was quoted above, appears to set out the pure "bursting bubble" theory: once the presumption is burst, all that remains is "the plaintiff's initial evidence" and "inferences properly drawn therefrom." 450 U.S. at 255 n.10. In addition, this footnote begins with a citation to Thayer, who stated that once the opponent of a presumption offers sufficient counterproof, "[all is then turned into an ordinary question of evidence, and the two or three general facts presupposed in the rule of presumption take their place with the rest, and operate, with their own natural force, as a part of the total mass of probative matter." James B. Thayer, *Preliminary Treatise on Evidence* 346 (1898). Finally, both *Burdine* and *Hicks* invoke Federal Rule of Evidence 301, which has generally been interpreted as embodying the "bursting bubble" theory. *See e.g., McKenna v. Pacific Rail Serv.*, 32 F.3d 820, 829-30 (3d Cir. 1994); *id.* at 841 (Mansmann, J., dissenting); *A.C. Aukerman Co. v. R.L. Chaides Constr.*, 960 F.2d 1020, 1037-1038 (Fed.Cir. 1992); *In re Yoder Co.*, 758 F.2d 1114, 1120 & n.13 (6th Cir. 1985); *Legille v. Dann*, 544 F.2d 1, 5-7 (D.C.Cir. 1976); 10 *Moore's Federal Practice* § 301.04 [4.-1] at III-22 (1995-96 Supp.); 1 *Weinstein's Evidence* 301-9; 9 *Wigmore on Evidence* § 2491(2) (3d ed. 1940).

In *McKenna, supra,* all of the panel members agreed that the *McDonnell Douglas* presumption and Federal Rule of Evidence 301 embody the "bursting bubble" theory. Writing for the majority, Judge Lewis concluded that the *McDonnell Douglas* presumption is governed by Federal

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[4] *Id.* at 510.

[5] *Id.*

Rule of Evidence 301 and that under this rule "the introduction of evidence to rebut a presumption destroys that presumption, leaving only that evidence and its inferences to be judged against the competing evidence and its inferences to determine the ultimate question at issue." 32 F.3d at 830. Judge Lewis then went on to hold that the same rule applies under the New Jersey Law Against Discrimination. *Id.* In dissent, Judge Mansmann agreed that the "bursting bubble" theory applies to federal claims, but contended that the New Jersey presumption has a more durable effect. Specifically, she wrote that "the federal rule 'bursts the bubble' of the presumption, while the New Jersey rule creates an issue for the jury." *Id.* at 841 (Mansmann, J., dissenting). With respect to their analysis of federal law, I think that both the *McKenna* majority and dissent were right.

C. The version of Rule 301 that was proposed by the Advisory Committee and promulgated by the Supreme Court rejected the "bursting bubble" theory in favor of the theory advocated by Professor Edmund M. Morgan and others.[6] Proposed Rule of Evidence 301 and Advisory Committee Note, 56 F.R.D. 183, 208 (1973). Under this proposed rule, a presumption would have shifted the burden of persuasion. *Id.*

Congress, however, rejected this proposal. The House of Representatives instead adopted a rule that represented an "intermediate position" between the "Thayer" and "Morgan" theories. H.R.Rep. No. 93-650, 93d Cong.,

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[6] *See, e.g.*, Edmund M. Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 Harv.L.Rev. 59, 82 (1933).

1st Sess. 7 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7081. The House rule provided that "a presumption imposes on the party against whom it is directed the burden of going forward with the evidence, and, even though met with contradicting evidence, is sufficient proof of the fact presumed to be considered by the trier of fact." 120 Cong.Rec. 2370 (1974).

In the Senate, the Advisory Committee and the Judicial Conference's Standing Committee on Practice and Procedure advocated a return to the originally proposed version of Rule 301. Dismissing the House compromise as conceptually unsound, the committee argued that "[t]he basic choice is between the so-called 'bursting bubble' theory and one shifting the burden of persuasion." Reporter's Memorandum, for the Advisory Committee on Evidence and the Standing Committee, to the Senate Judiciary Committee, *reprinted in 1 Weinstein's Evidence* at 301-3. The Senate rejected the House approach and passed the present version of Rule 301. S.Rep. No. 93-1277, 93d Cong., 2d Sess. ___, *reprinted in* 1974 U.S.C.C.A.N. 7051, 7056; 120 Cong. Rec. 37,085 (1974).

The Advisory Committee and the Committee on Rules of Practice and Procedure then turned to the Conference Committee and again urged the adoption of the originally proposed version of Rule 301, arguing once more that "[b]asically the choice to be made in treating the effect to be given presumptions lies between giving them only the effect of a 'bursting bubble' and giving them the greater effect of imposing a burden of disproof once evidence has established the conditions that call the presumption into operation." *See 1 Weinstein's Evidence* at

301-7. However, the Conference Committee recommended adoption of the Senate version, Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7099, and this recommendation was enacted. 120 Cong.Rec. 40,070, 40,897 (1974).

Rule 301 states:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Like the members of the *McKenna* panel and the other previously mentioned authorities, I think that the most reasonable interpretation of Rule 301 is that it incorporates the "bursting bubble" theory. The text of the rule supports this conclusion since it does not even hint that a presumption does anything but shift the burden of production. If Congress had intended for a presumption to have any further effect, such as guaranteeing that the presumed fact would not be rejected at the summary-judgment or judgment-as-a-matter-of-law stage, I think that Congress would have said so in the text of the rule. I do not think that Congress would have left it for the courts to divine, without any clue in the language of the rule, that a presumption should have such an important additional effect.

Furthermore, the legislative history suggests that Congress, advised that it was compelled to choose

between the Thayer and Morgan approaches, adopted "the pure Thayer rule." 1 *Weinstein's Evidence* at 301-9. Professors Wright and Graham disagree with this position based on a passage in the Conference Report. *See* 21 Charles A. Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure* §§ 5120 at 547 & n.27, 5126 at 609-10 & nn. 23-24 (1977). Discussing the consequences that follow when the adverse party meets its production burden, the Conference Report states:

> If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may presume the existence of the presumed fact from proof of the basic facts. *The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.*

Conf. Rep. 93-1597, *supra*, at ___, *reprinted in* 1974 U.S.C.C.A.N. at 7099 (emphasis deleted; emphasis added). Because the highlighted sentence discusses jury instructions, Professors Wright and Graham view it as showing that the Conference Committee contemplated that a presumption, even if met with enough counterproof to satisfy the adverse party's production burden, would nevertheless serve to take the factual question to the jury. 21 Wright and Graham, *supra*, § 5126 at 610 n.23.

Like the Sixth Circuit, *In re Yoder Co.*, 758 F.3d at 1119-20 n.13, I do not find this interpretation compelling. The Sixth Circuit wrote:

> The emphasized portion of this quotation is not inconsistent with the bursting bubble theory. . . . The statement that the jury *may* be instructed to consider an inference is most naturally read as

> permitting such an instruction when called for by the existence of a logical inference.

Id. (emphasis in original). This reading is at least as reasonable as the alternative offered by Professors Wright and Graham, and I am therefore unwilling, based solely on the statement in question, to conclude that Rule 301 was intended to give presumptions an important effect not mentioned in the text of the rule.

I must acknowledge that a passage in *Hicks* may be read as supporting Professors Wright and Graham's argument, at least with respect to the *McDonnell Douglas* presumptions. *Hicks* stated:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination,[4] and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*."

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4. Contrary to the dissent's confusion-producing "analysis, *post*, at 535-536, there is nothing whatever inconsistent between this statement and our later statements that (1) the plaintiff must show "*both* that the reason was false, *and* that discriminaion was the real reason," *infra*, at 515, and (2) "It is not enough . . . to *dis*believe the employer," *infra*, at 519. Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of

> discrimination, *there must be a finding of discrimination.*

509 U.S. at 511 (all emphases in original) (ellipsis in original).

Read in isolation, this passage may seem to suggest that the facts underlying the prima facie case plus the rejection of the employer's explanation are always sufficient to take the case to the jury. This is the interpretation adopted in *Fuentes v. Perskie*, 32 F.3d 759, 763 (3d Cir. 1994), and by the majority here. *See* Maj. Op. 9-10. However, like the First, Fifth, and Eleventh Circuits, I do not think that this reading is compelled. *See Isenbergh*, 97 F.3d at 442-45; *Rhodes*, 75 F.3d at 993-95; *Woods*, 30 F.3d at 260-61 n.3. Instead, I believe that this passage can reasonably be interpreted as simply rejecting the "pretext plus" approach that Justice Souter attributed to the Court in his dissent (509 U.S. at 535 (Souter, J., dissenting)) to which the Court referred. 509 U.S. at 511 n.4. Under the "pretext plus" approach, as summarized in the law review article that Justice Souter cited, "the plaintiff must produce some additional evidence other than the evidence supporting the prima facie case and other than the fact of the defendant's deception." Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the 'Pretext-Plus' Rule in Employment Discrimination Cases*, 43 Hastings L.J. 57, 87-88 (1991). The previously quoted passage from *Hicks* may be interpreted to mean that such additional proof (i.e., the "plus" in "pretext plus") is not always required. Accordingly, when the Court wrote (509 U.S. at 511) that "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination," what the Court may have meant is that

the trier of fact is permitted to draw such an inference – in the sense that the trier of fact is not precluded by any legal rule, such as "pretext plus," from doing so – if such an inference is factually warranted. The same interpretation may be given to the Court's subsequent statement that "upon [the] rejection [of the defendant's proffered reason] '[n]o additional proof of discrimination is *required*,' " 509 U.S. at 511. " 'No additional proof is *required*' " in that there is no blanket legal requirement of such proof, as there would be under the "pretext plus" approach. Similarly, the "rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination" (*id.* at 511 n.4) in the sense that no other blanket legal requirement, such as proving the "plus," is needed. I favor this interpretation because it is consistent with my conclusion, discussed above, that Rule 301 presumptions in general and the *McDonnell Douglas* presumption in particular are governed by the "bursting bubble" theory.

D. If it is true, as I believe, that the *McDonnell Douglas* presumption is governed by the pure "bursting bubble" theory, it follows that the majority's blanket rule barring summary judgment or judgment as a matter of law in favor of the defendant is unsound. It is well recognized that under the pure "bursting bubble" theory, once a presumption is destroyed, the proponent of the presumption has no guarantee that its case will go to the trier of fact. One treatise states that the previously presumed fact may then be found "only if the natural probative force of the basic facts that brought the presumption into play is sufficient to support such a finding (or the

evidence as a whole supports it). Otherwise, the presumed fact may not be found, *and the presumption does not protect this possibility.*" 1 Christopher B. Mueller and Laird C. Kirkpatrick, *Federal Evidence* § 70 at 332 (1994) (emphasis added). Another observes: "The opponent of the presumption may still not be entitled to a directed verdict, but if its motion is denied, the ruling will have nothing to do with the existence of a presumption." 2 *McCormick on Evidence*, § 344 at 462. *See also* 21 Wright and Graham, *Federal Practice* § 5122 at 564. In Thayer's words, after the presumption is spent, "[a]ll is then turned into an ordinary question of evidence." Thayer, *Preliminary Treatise* at 346.

III.

Once it is recognized that the *McDonnell Douglas* presumption disappears in the face of sufficient counterproof, the test to be applied in ruling on a defense motion for summary judgment or judgment as a matter of law is clear: the motion should be granted if all of the evidence in the record and the inferences that may be drawn from that evidence could not persuade a rational trier of fact that intentional discrimination on the ground alleged by the plaintiff was a determinative cause of the challenged action. This test follows from the following three rules:

1. In a *McDonnell Douglas* case, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253; *see also Hicks*, 509 U.S. at 507.

2. This burden requires proof that discrimination on the ground alleged was a determinative cause of the challenged action. *Miller v. CIGNA Corp.*, 47 F.3d 586 (3d Cir. 1995) (*in banc*).

3. Summary judgment and judgment as a matter of law are proper where a trier of fact could not rationally return a verdict in favor of the opposing party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

Putting these rules together, it is apparent that a defense motion for summary judgment or judgment as a matter of law should be granted where a trier of fact could not rationally find based on the record (and giving no further consideration to the presumption as such) that discrimination on the ground alleged was a determinative cause of the challenged action.

The majority, however, takes the position that such a motion must be denied whenever there is enough evidence to support a finding that the explanation offered by the employer is untrue. *See* Maj. Op. 10. This position can be correct only if proof that is sufficient to justify disbelief of the employer's explanation (the majority's test) will always be enough to justify a finding by a rational trier of fact that discrimination on the ground alleged was a determinative cause of the challenged action. Unless this relationship invariably holds true – and I will show below that it does not (*see* part VI, *infra*) – the majority's blanket rule is wrong.

V.

Before turning directly to that question, however, it is helpful to examine the types of evidence of discrimination that may exist in the record of a discriminatory-treatment case after the *McDonnell Douglas* presumption is burst and sufficient evidence to show pretext is offered. This evidence may be grouped into four categories.

A. First, there are the facts that the plaintiff proved to make out the prima facie case and the inferences to which those facts naturally give rise. In some cases, the "natural probative force"[7] of these facts is substantial, but in others it is relatively weak. "The burden of establishing a prima facie case of disparate treatment is not onerous," *Burdine*, 450 U.S. at 253, and "evidence sufficient to make out a prima facie case is not always sufficient to support the ultimate finding of intentional discrimination. . . . Where the evidence behind the prima facie showing is strong, it may, standing alone, justify a finding of intentional discrimination. . . . But where the prima facie case is based on minimal evidence, it cannot." *United States v. Redondo-Lemos*, 27 F.3d 439, 442 (9th Cir. 1994). An example which the prima facie case gives rise to only a weak inference of discrimination is the age discrimination case in which a somewhat younger person is hired, promoted, retained, etc., instead of a slightly older person. Under our cases, a plaintiff in an age discrimination suit can make out a prima facie case by showing that he or she (1) was over 40 years of age at the

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[7] 1 Mueller and Kirkpatrick, *Federal Evidence* § 70 at 333.

time in question, (2) applied for and was minimally qualified for the job, (3) but was rejected (4) in favor of a person who was " 'sufficiently younger to permit an inference of age discrimination.' " *Barber v. CSX Distribution Services*, 68 F.3d 694, 698 (3d Cir. 1995), quoting *Fowle v. C & C Cola*, 868 F.2d 59, 61 (3d Cir. 1989). With respect to the final element of this formulation, we have held that an eight-year gap is enough and have suggested that a five-year difference may suffice. *Barber*, 68 F.3d at 695. Thus, I believe that a plaintiff claiming that he or she was denied a promotion due to age discrimination could make out a prima facie case under our circuit law by showing, for example, that he or she (1) was 43 years old at the time in question, (2) had the minimum requisite qualifications, (3) and applied for the job, but that (4) the employer instead chose a 35-year old.

I agree that these facts permit an inference of age discrimination, but I do not think that a reasonable person could give these facts, standing alone, much weight. A way to test this hypothesis is to ask: if you knew nothing more about this promotion decision, how much would you bet that, when all the facts were revealed, the reason for the decision would turn out to be age discrimination? I think that few people would be willing to wager much on this bet – precisely because the natural probative force of the few facts needed to establish the prima facie case is slight.

A similar situation can arise in cases of alleged national origin or religious discrimination. In order to make out a prima facie case of discrimination on these grounds, a plaintiff must show that he or she (1) is a member of a national origin group or adherent of a

religion, (2) applied or was considered for the position or benefit, and (3) was at least minimally qualified, but (4) the position or benefit went to a person of another national origin or religion. *See, e.g., Vitug v. Multistate Tax Comm'n*, 88 F.3d 506, 515 (7th Cir. 1996) (plaintiff established a prima facie case by showing that he was a qualified Filipino Catholic and that promotion went to "a non-Filipino and born-again Christian"). How strong an inference of national origin or religious discrimination naturally arises from such a bare showing?

Suppose that all that you knew about an employment decision was that the employer rejected an applicant who traced his or her national origin to one country and instead chose another person who did not trace his or her national origin to that particular country. How confident would you be that the reason for the decision, when all the facts were revealed, would turn out to be national origin discrimination?

Or suppose that all that you knew about an employment decision was that the employer rejected a minimally qualified Protestant, Catholic, Jew, Muslim, or adherent of another religion in favor of another employee of a different religion. How confident would you be that the reason for the decision, when all the facts were revealed, would be intentional discrimination on the basis of religion? In my view, most rational people, *without knowing more*, would have little confidence that the real reason would turn out to be national origin or religious discrimination, and I therefore submit that these bare facts naturally give rise to only a slight inference of discrimination. And, although I will not belabor the point by posing further examples, I think that the natural probative force

of the prima facie case is sometimes weak in race and gender cases as well. In short, I submit that the natural probative force of the facts underlying the prima facie case varies from case to case and that in some cases that force will be too weak on its own to sustain a finding of discrimination.

B. Second, there is the inference of discrimination that may often be drawn from the ruling out of the employer's explanation. The degree to which such an inference is justified, however, is inversely proportional to the degree to which the record contains evidence of a third possible explanation for the challenged employment action. For example, if it is certain that an employee was discharged for either reason "a" or reason "b" and no other, and if reason "b" can be ruled out, then obviously it may be inferred that the real reason for the discharge was "a." But if an employee was discharged for either reason "a," reason "b," or reason "c," then ruling out reason "b" does not necessarily permit a strong inference that reason "a" was the real reason.

Cases in which the record contains strong evidence of a third explanation for the challenged action are by no means unknown. *See Miller v. CIGNA Corp.*, 47 F.3d 586, 597 (3d Cir. 1995). Perhaps the clearest examples are cases in which the plaintiff challenges a single adverse employment action based on two or more alternative grounds, a rather common tactic. *See, e.g., Roxas v. Presentation College*, 90 F.3d 310 (8th Cir. 1996) (plaintiff alleged race, national origin, gender, and age discrimination); *Lawrence v. Nat'l Westminster Bank of N.J.*, 1996 WL 589189, No. 95-5603 (3d Cir. Oct. 15, 1996); *Rabinovitz v. Pena*, 89 F.3d 482 (7th Cir. 1996) (age, religion, and retaliation); *Ford v.*

Bernard Finesan Dev. Ctr., 81 F.3d 304 (2d Cir. 1996) (race, age, and gender); *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996) *petition for cert. filed*, 65 U.S.L.W. 3267 (U.S. Sept. 24, 1996) (No. 96-486) (age, gender, and retaliation); *Evans v. Technologies Applications & Ser. Co.*, 80 F.3d 954 (4th Cir. 1996), (age and gender); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3181 (U.S. Aug. 28, 1996) (No. 96-337) (gender and disability); *Americanos v. Carter*, 74 F.3d 138 (7th Cir. 1996), *cert. denied*, 116 S.Ct. 1853 (1996) (age, gender, and national origin); *Castillo v. Frank*, 70 F.3d 382 (5th Cir. 1995) (age, gender, and national origin); *Meinecke v. H & R Block*, 66 F.3d 77 (5th Cir. 1995) (age and gender); *Johnson v. Office of Senate Fair Employment Practices*, 35 F.3d 1566 (Fed. Cir. 1994) (gender and religion); *Dashnaw v. Pena*, 12 F.3d 1112, 1114 (D.C.Cir. 1994), *cert. denied*, 115 S.Ct. 417 (1994) (age, national origin, religion, and race); *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035 (7th Cir. 1993) (age and gender).

To take one of the many possible combinations of claims, an employee might contend that he or she did not get a promotion (1) because of gender and (2) because of disability. If the record in such a case contains strong evidence of disability discrimination, rejection of the employer's explanation (let us say, inferior qualifications) will not by itself permit a strong inference that the employer's true reason was gender discrimination.

The degree to which a trier of fact can reasonably conclude that there was discrimination on the ground claimed by the plaintiff also depends upon the degree to which the trier of fact can reasonably reject the employer's reason(s). (It is important to bear in mind that

acceptance or rejection of an employer's reasons need not be an all-or-nothing proposition.) The evidence in a particular case may be such as to justify only a marginal or partial disbelief or belief of the employer's reason(s). For example, a trier of fact might be justified in believing that it is more probable than not (but barely so) that the employer's explanation is false. Or, a trier of fact might be justified in believing that it is more probable than not (but barely so) that the employer's explanation is true. In addition, a trier of fact might be justified in believing that the reason asserted by the employer was not the sole cause but was a partial cause (say a 20%, 40%, 60%, or 80% cause) for the challenged action. Or, if the employer asserts multiple reasons, the evidence might be such as to justify belief (to some degree) of some reasons but not others. All other things being equal, the more strongly and completely the trier of fact can rationally rule out the employer's reason(s), the more justified it is to conclude that there was discrimination on the ground alleged – and vice versa.

C. Third, disbelief of the employer's explanation may also give rise to an inference that the employer was trying to conceal discrimination on the ground that the plaintiff claims. But the strength of this inference, too, will vary based on the facts. Its strength will depend on whether there is evidence in the record of some other possible explanation that the employer might not want to disclose (*e.g.*, in my prior hypothetical, disability discrimination).[8] In addition, its strength will obviously be

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[8] Or imagine a situation when the employer promotes A (a white male) over B (a white female) because A was related to

proportional to the extent and strength of the trier of fact's disbelief of the employer's reason(s).

D. The fourth category consists of any other relevant evidence of discrimination on the ground asserted. "[S]tray remarks in the workplace" that are insufficient to make out a *Price Waterhouse* case are an example. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring). When evidence falling into this category is present, it should always be taken into account in determining whether a defense motion for summary judgment or judgment as a matter of law should be granted – something that the *Fuentes* test does not accomplish, as I will show below. See *infra* at 52-53. But of course, many *McDonnell Douglas* cases lack evidence of this sort.

VI.

Having surveyed the types of evidence of discrimination that are relevant for present purposes, I return to the question whether there will always be enough evidence to support a verdict of discrimination on the ground

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the employer. The employer may not wish to disclose his real reasons for not promoting B because the news as to his criteria for promoting B over A would likely hurt his reputation and lower employee morale. "[A]n employer may offer a pretextual reason for a personnel decision that is nonetheless nondiscriminatory." *Fisher v. Vassar College*, 70 F.3d 1420, 1437 (2d Cir. 1995); *Cf.* Michael Seloni, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L.Rev. 1251, 1303 (1995) (describing a set of economic models that tie worker effort to perceptions of fairness).

alleged by the plaintiff after the *McDonnell Douglas* presumption has burst and sufficient evidence of pretext has been adduced. To ensure that I am not misunderstood, I emphasize again that I think that under these circumstances there will *usually* be sufficient evidence – but *not always*. Specifically, where the natural probative force of the facts offered to prove the prima facie case is weak, where there is strong evidence in the record that the challenged employment action was attributable to some factor other than the discriminatory ground alleged by the plaintiff or the explanation offered by the employer, and where there is no other evidence that the action was due to discrimination on the ground alleged, the evidence of discrimination on that ground may be insufficient to sustain a verdict and thus insufficient to defeat summary judgment or judgment as a matter of law.

Here is an example. A man with a disability applies for a promotion, but the promotion is given to a woman without a disability. *See, e.g., Antol v. Perry*, 82 F.3d 1291 (3d Cir. 1996) (man who was denied promotion sued for gender and disability discrimination). The plaintiff establishes a prima facie case of gender discrimination by showing that he is a man, he was qualified for the job, he applied, but it was given to a woman. There is no other evidence of gender discrimination against men; indeed, there is evidence that the decisionmaker was a man and that the great majority of the employees in the job category at issue were men. The employer says that the woman was chosen because her qualifications were better, but the plaintiff shows that this explanation is full of holes. In addition and most important, there is strong, direct evidence that the decisionmaker was biased against

the plaintiff because of his disability. Among other things, there is testimony that, when the decisionmaker learned that the plaintiff had applied for the promotion, the decisionmaker made insulting and derogatory remarks about the plaintiff's disability.

Is there enough evidence in this case to convince a rational trier of fact that the promotion decision was based on *gender* discrimination? I think not, and if I am right, then the majority's blanket test is disproven. Consider the evidence in each of the four categories that I previously described. The facts underlying the prima facie case of gender discrimination – basically that the plaintiff was qualified but a woman was given the job instead – have little natural probative force for the purpose of showing gender discrimination; a qualified man might be rejected in favor of a woman for many other reasons. As for the evidence that the employer's explanation (the woman's supposedly better qualifications) was untrue, ruling out the employer's explanation still leaves both gender and disability discrimination as possible explanations, and in light of the strong evidence of disability discrimination, does little to show gender discrimination. Likewise, while the employer's conduct in proffering a false explanation permits an inference that the employer's real reason was one that it wished to hide, that inference does little to show that the employer's real reason was gender discrimination because there is strong evidence of another explanation (disability discrimination) that the employer would also have a motive to conceal. Therefore, I submit that the evidence in this hypothetical case is insufficient to support a reasonable finding of gender discrimination and that that theory

should be weeded from the case before the plaintiff's claim of disability discrimination is sent to the trier of fact.

The majority's test, however, would require that the gender discrimination claim be sent to the trier of fact as well. Indeed, if the plaintiff had added claims of age, race, national origin, and religious discrimination and was able to do the minimum necessary to establish a prima facie case on all of those grounds, all of those claims would have to be sent to the trier of fact as well. I do not think that such results can be squared with the cardinal rules that the plaintiff in a discriminatory treatment case must prove intentional discrimination on each ground alleged and that summary judgment or judgment as a matter of law must be granted if the record does not rationally support a judgment for the non-moving part on each such ground.[9] *See, e.g.*, Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich.L.Rev. 2229, 2306-2311 (1995).

VII.

Recognition of what I believe is the correct test would clarify the analysis of discriminatory-treatment cases and would avoid analytical difficulties that the

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[9] The majority's test would of course be correct if a plaintiff, in order to establish a prima facie case, were required to prove facts that are sufficient to support a finding of discrimination on the ground alleged. At least under our circuit law, however, the establishment of a prima facie case does not demand such a heightened showing.

majority's test creates. I will discuss two of these difficulties here.

A. The first concerns cases in which the employer offers a multi-part explanation for the challenged action. The *Fuentes* opinion, which the majority follows, first states that, when an employer asserts that the challenged action was taken for several reasons, the evidence "must allow a factfinder reasonably to infer that *each* of the employer's proffered nondiscriminatory reasons . . . was either a *post hoc* fabrication or otherwise did not actually motivate the employment action. . . . " 32 F.3d at 764 (emphasis in original) (citations omitted). However, *Fuentes* qualifies this statement by adding that "[i]f the defendant proffers a *bagful* of legitimate reasons, and the plaintiff manages to cast substantial doubt on *a fair number* of them, the plaintiff may not need to discredit the remainder." *Id.* at 764 n.7 (emphasis added).

I am not sure what these rules mean. What is the difference between "several reasons" and "a bagful"? What is a "fair number" of a "bagful"? If the employer offers three reasons, each of which, it says, was equally important in the challenged decision, how many must the plaintiff knock down?All of them? Or will two suffice? (I assume that one would not be a "fair number.") What if the employer says that reason one was the most important, counting for, say, 40%, and that reasons two and three each counted for 30%? Would it be enough for the plaintiff to refute reason one? If so, would refuting reason two by itself also suffice? Why? I don't know, and I don't think that it is possible to provide a satisfactory answer to questions of this sort within the framework of the majority's test.

By contrast, these problems disappear if what I contend is the correct test is used. No matter how many reasons the employer offers and no matter what combination of reasons the plaintiff succeeds in knocking down, the dispositive question remains the same: taking into account all of the evidence in the record, including whatever inferences and deductions can rationally be drawn from the rejection of some (or all) of the employer's proffered reasons, is there enough proof to permit a rational trier of fact to find that intentional discrimination on the ground alleged was a determinative cause of the challenged action?

B. The second analytical difficulty concerns the ability of a plaintiff to survive summary judgment or judgment as a matter of law by combining the evidence that necessarily remains after the *McDonnell Douglas* presumption has burst and sufficient evidence of pretext has been offered (the facts underlying the prima facie case and the inferences that logically flow from the rejection of the employer's explanation) with any other direct and circumstantial evidence of discrimination that the plaintiff may be able to find. Under *Fuentes*, a plaintiff may defeat summary judgment or judgment as a matter of law by "*either* (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." *Fuentes*, 32 F.3d at 764 (emphasis in original).

Why can't a plaintiff potentially satisfy his or her burden by combining some evidence from each of these categories? For example, if a plaintiff can almost, but not

quite, show enough "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons" to come within the first part of this test, *id.* at 765, why can't the plaintiff make it over the hump by adding a bit of evidence from the second part, i.e., other direct or circumstantial evidence of discrimination? *Fuentes* doesn't explain, and I don't think that any good explanation is possible.

In sum, I submit that the majority's test is both wrong and unwieldy and that the correct test is simply whether a rational trier of fact could find, based on the record, that discrimination on the ground alleged was a determinative cause of the challenged employment action.

VIII.

Applying this test, I agree with the district judge's analysis of the record. The record shows great personal friction between the plaintiff and her supervisors regarding matters such as grooming, smoking, tardiness, and giving away free food and beverages, but the district judge saw little if any evidence of any kind that could reasonably link this personal animosity to the plaintiff's gender. The district judge wrote that she was "left searching the record for evidence that gender played a determinative role in defendant's conduct."

In reaching the opposite conclusion, the majority apparently relies on the following: (a) "no woman had ever held the position of Manager of Restaurants," (b) "a man replaced Sheridan as Head Captain of the Green Room morning shift," (c) "Amblard had told Sheridan he

would watch her like a 'hawk' and a 'dog'," and (d) Amblard "ignor[ed] her and [spoke] instead to one of her male supervisors if one was present." Maj. Op. 7. But factor (a) gives rise to only a weak inference of gender discrimination because the plaintiff was found to be unqualified for the position of Manager of Restaurants. Factor (b) likewise gives rise to only a weak inference since two of the other four head captains were women. Factor (c) does not provide a link to gender; nor does factor (d). Is all of this evidence taken together enough to persuade a rational factfinder that the reason for the animosity between the plaintiff and her supervisors was gender rather than sheer personal antipathy? The district judge concluded that it was not, and I am inclined to agree with her analysis.

I also agree with the district judge's conditional grant of a new trial. The district judge applied the correct legal standard. She recognized that "[a] new trial cannot be granted . . . merely because the court would have weighed the evidence differently and reached a different conclusion." *Sheridan II* at 12 (quoting *Markovich v. Bell Helicopter Textron, Inc.*, 805 F. Supp. 1231, 1235 (E.D.Pa.), *aff'd*, 977 F.2d 568 (3d Cir. 1992)). Instead, the court stated, a new trial may be granted on the ground that the verdict was against the weight of the evidence only when the failure to do so would result in injustice or shock the conscience of the court. *Id.* Moreover, in assessing the evidence, the court recognized that disbelief of defendant's proffered reason was evidence of discrimination. Accordingly, I believe that the district judge applied the correct legal precepts in ruling on defendant's new trial

motion, and because I do not think that she abused her discretion in granting the motion, I would affirm.

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Clerk of the United States Court of Appeals
for the Third Circuit

Filed January 31, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-7509

BARBARA R. SHERIDAN
Appellant

v.

E. I. DUPONT de NEMOURS AND COMPANY;
JACQUES AMBLARD

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
(D.C. Civil No. 93-00046)

Argued: May 4, 1995

Before: SLOVITER, *Chief Judge*, and ALITO, *Circuit Judge*, and SCHWARZER, *Senior District Judge**.

(Opinion Filed: January 31, 1996)

THOMAS S. NEUBERGER, ESQ.
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* The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

RAYMOND M. RIPPLE, ESQ.
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OPINION OF THE COURT

ALITO, *Circuit Judge*:

Barbara Sheridan filed this action against her former employer, E.I. duPont de Nemours & Co., Inc. ("duPont"), and a duPont supervisory employee, Jacques Amblard, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 *et seq.* She asserted several different claims for sex discrimination and unlawful retaliation. Before trial, the district court granted the defendants' motion in limine to exclude certain evidence. During trial, the court dismissed the claims against Amblard on the ground that an employee cannot be sued under Title VII. The jury subsequently returned a verdict in favor of Sheridan and against duPont on her constructive discharge claim, but the jury found for duPont on Sheridan's remaining claims. The district court then granted duPont's motion for judgment as a matter of law (and in the alternative for a new trial) on the constructive discharge claim.

Following the great weight of the federal appellate decisions concerning employee liability under Title VII,

the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. § 12111 *et seq.*, we affirm the dismissal of the claims against Amblard. Because we are bound by our court's decision in *Fuentes v. Perskie*, 32 F.3d 759 (3d Cir. 1994), and subsequent decisions following *Fuentes*, we reverse the entry of judgment as a matter of law on the constructive discharge claim against duPont, but we affirm the granting of a new trial. We also hold that the district court did not err in its ruling on duPont's motion in limine.

I.

Barbara Sheridan began working for duPont in 1979 as a part-time waitress in the Hotel duPont. *Sheridan v. E.I. duPont de Nemours and Co.*, No. 93-46 (D.Del. March 28, 1994) ("Sheridan I") at 2. She was subsequently promoted to hostess in the Lobby Lounge, group leader in the Lobby Lounge, and captain in the Brandywine Room restaurant. *Id.* at 2-3. In May 1989, she was transferred to the Green Room restaurant and was promoted to head captain of the breakfast and lunch shifts. In this capacity, she reported to Ed Barba, the Green Room restaurant manager. Barba, in turn, reported to Nicholas Waller, who managed all the hotel's restaurants. *Id.* at 3.

Initially, Sheridan received good employment reviews. Her 1990 performance review rated her overall performance as "very good," which was the second highest possible rating. App. 197. She received the highest possible rating in the categories of interpersonal relationships, planning, and problem solving. *Id.* Her lowest

marks, in the categories of oral and written communication and attendance, were respectively "good" and "satisfactory." *Id.* The review summarized her strengths and weaknesses as follows:

> Very good guest relations, organized. As a team player, strengthening is needed to improve the overall relationship with the rest of the operation. . . . Since May of 1989, Barbara's persistence has paid off by guest loyalty, staff does not call off sick, and overall very good morale from the support team.

App. 198.

Sheridan also received several awards and merit increases. In May 1990, she received a $948 yearly merit increase. She also won a $1000 accomplishment award in December of that year. App. 151. The letter that informed her of this award stated:

> [t]he enthusiasm you portray in greeting customers and providing them service is outstanding. . . . [Y]ou project an image of quality, service and commitment. . . . Your success in creating an environment in which high quality customer service flourishes is evident by the team spirit of your staff. Again, congratulations for this well-deserved award and thank you for being a role model and a true ambassador for the company.

Id. While other employees received awards for $200 to $500, Sheridan was the only restaurant employee to receive a $1000 award. App. 287. The next month, she was chosen to appear in a company video, and in February 1991 she received another merit raise of $1188 per year. App. 733-34, 740-41.

DuPont claims that Sheridan's performance began to deteriorate in early 1991. In February 1991, Ed Barba met with Sheridan and discussed various corrective measures. App. 228. Two of these measures were maintaining an accurate count sheet to insure a fair distribution of "covers" (*i.e.*, tips received from the tables) and ending her use of the Green Room bar for grooming and smoking. *Id.* Despite this meeting, Barba later saw Sheridan putting on makeup and smoking in the Green Room bar. App. 229, 305h.

According to Nicholas Waller, he met with Sheridan in the summer of 1991 to discuss "numerous complaints" about her treatment of Green Room employees. App. 960. Waller testified that employees had complained that Sheridan had asked them to perform personal services, such as parking her car, giving her a wake-up call, and taking personal mail to the post office. App. 963. These employees allegedly told Waller that those who helped her with these personal tasks were favored with more "covers." *Id.* Sheridan, however, disputed Waller's recollection of this meeting. Sheridan points to Barba's testimony that he was unaware of any employee complaints regarding "covers" between February and September 1991. App. 298. She also observed that, despite the alleged complaints, she received another promotion and raise on October 1, 1991. App. 142.

During the summer and fall of 1991, the hotel streamlined its operating structure. *Sheridan I* at 5. As part of this reorganization, the hotel eliminated the managers of the individual restaurants and hired a single new manager for all the restaurants. *Id.* Sheridan applied for this

new position, but the hotel selected Jeff Maisel. *Id.* Sheridan felt that she was qualified for this position and that she was not promoted because of her sex. On at least three occasions, she complained about this alleged discrimination to Jacques Amblard, the hotel general manager. *Id.* at 5-6.

On October 17, 1991, Maisel met with Sheridan to discuss her alleged unfairness in the distribution of "covers," her tardiness, and her continued disregard for the hotel's grooming policy. App. 206, 885. Subsequent to this meeting, duPont claims that the following infractions were recorded:

Oct. 20:	Sheridan was 45 minutes late and violated grooming policy.
Oct. 22:	Sheridan was 25 minutes late.
Oct. 23:	Sheridan was 20 minutes late.
Nov. 3:	Sheridan was 17 minutes late and violated grooming policy.
Nov. 3:	During a staff meeting, Sheridan left premises and was observed with another employee in a company van.
Nov. 7:	Sheridan was eating and smoking in Green Room bar during service hours.

App. 206.

Allegedly because of these continued infractions, Maisel placed Sheridan on probation on November 10, 1991. Maisel told her that in order to be taken off probation, she would have to report to work on time, follow the hotel's grooming and smoking policies, and stay in her assigned work area. App. 207. Maisel informed her

that further infractions or instances of poor performance could result in termination. App. 208.

Other incidents allegedly took place while Sheridan was on probation. When Joe Marshall, the room and service head captain, attended her daily staff meeting one day in February 1992, Sheridan told him to "leave her meeting," App. 219, and according to Maisel, who was present, Sheridan was quite rude. *Id.* Later, Sheridan was asked to work on a Sunday, but she initially refused. When told that she was required to report, she agreed but stated that "after 13 years she deserved to work Monday-Friday." App. 220.

In late February, the hotel began to investigate Sheridan for giving complimentary drinks without ringing up complimentary checks, as hotel policy required. App. 221. At trial, duPont offered evidence that Sheridan had improperly given away large quantities of complimentary drinks, as well as food. According to a supervisor who participated in the investigation, the investigation received "rather consistent feedback from the employees of the restaurant" that Sheridan "comped liquor and [did] not properly record[ ] it." App. 1159. An internal duPont document memorialized alleged statements by numerous co-workers, male and female, to the effect that Sheridan "comped" beverages and food without recording that this was being done. App. 222-226. The most damaging evidence came from a bartender, James Dougherty, who stated that he had kept a daily record of the drinks that Sheridan had improperly "comped," and that the total for the period from November 1, 1991, to February 18, 1992, was $921.75. Dougherty testified that his dates were

"about 98-percent accurate." App. 688. There was evidence, however, that Sheridan was on jury duty or was not scheduled to work on some of the days in question.

After the investigation was completed, Maisel and others met with Charles Beinkampen, the director of hospitality, to determine what to do about Sheridan, and they decided to reassign her to a non-supervisory position that did not involve the handling of cash. App. 910, 1160. The hotel offered her the positions of front desk representative, health spa attendant, or banquet server. She was offered these positions without a reduction in pay. App. 910. While the hotel also claimed that she would be eligible for promotion and raises in any of these positions, Sheridan offered conflicting evidence. Rather than accepting reassignment, Sheridan resigned in April 1992.

Sheridan subsequently filed suit against duPont and Amblard, asserting three violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Count I of her complaint claimed that the hotel had refused to promote her to manager of restaurants because of her sex. App. 82-83. Count II charged that she had been placed on probation and that other disciplinary actions had been taken against her in retaliation for her complaints about the hotel's failure to promote her on account of her sex. App. 83. Count III alleged that the hotel had created intolerable working conditions that resulted in her constructive discharge. App. 83-84.

The district court denied the defendants' motion for summary judgment, holding, among other things, that the evidence in the summary judgment record, if

believed, was sufficient to show that Sheridan had been constructively discharged. App. 68-69. The court granted in part the defendants' motion in limine to exclude certain testimony by Sheridan and two other witnesses. The court also ruled that the jury would serve as the finder of fact for the claims based on conduct that occurred after November 21, 1991, the date of the enactment of the Civil Rights Act of 1991, P.L. 102-166, 105 Stat. 1071 (1991), which granted a right to a jury trial on Title VII intentional discrimination claims for which compensatory or punitive damages are sought. The court ruled that the jury would serve in an advisory capacity for the claims based on events that occurred before that date. Thus, the court ruled that the jury would return advisory verdicts with respect to Count I (failure to promote) and those alleged retaliatory acts (Count II) that occurred before November 21, 1991. The court ruled that the jury would serve as the finder of fact with respect to the remaining alleged retaliatory acts and with respect to Count III (constructive discharge). During trial, the court dismissed the claims against Amblard, holding that individual employees are not liable under Title VII.

The jury returned special interrogatories. With respect to Count I (failure to promote), the jury found that Sheridan was not qualified for the job of manager of restaurants. App. 31. With respect to Count II (retaliation), the jury found that the defendants' actions both before and after November 21 were not taken in retaliation for Sheridan's complaints about the defendants' failure to promote her. App. 32. However, on Count III (constructive discharge), the jury found in favor of Sheridan and awarded her $17,500 in compensatory damages,

exclusive of lost wages.[1] App. 33. The court adopted as its own the jury's findings with respect to the conduct alleged in counts I and II that took place before November 21.

Both parties then moved for judgment as a matter of law or in the alternative for a new trial. The court granted duPont's motion for judgment as a matter of law because it found that the evidence was insufficient to allow a reasonable jury to conclude that sex played a determinative role in Sheridan's constructive discharge. *Sheridan v. E.I. duPont de Nemours and Co.*, No. 93-46, (D.Del. July 14, 1994) (*"Sheridan II"*). The court did not dispute the fact that Sheridan had established a prima facie case, and the court stated that it was "willing to accept that the jury rejected the defense witnesses' claims that the investigation into plaintiff's 'comping' activities was legitimate." *Sheridan II* at 9. But the court added: "Having accepted that proposition . . . , the Court is still left searching the record for evidence that gender played a determinative role[2] in defendant's conduct." *Id.*

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[1] The court calculated Sheridan's lost wages to be $51,072. *Sheridan v. E.I. duPont de Nemours and Co.*, No. 93-46 (D.Del. May 20, 1994). However, the jury found that Sheridan had failed to mitigate these damages in the amount of $33,000. The court thus awarded her the difference – $18,072 – in addition to six months of front pay in the amount of $12,768. *Id.* at 8.

[2] This case was tried prior to our decision in *Miller v. CIGNA Corp.*, 47 F.3d 586 (3d Cir.1995) (in banc), in which we held that a plaintiff in an Age Discrimination in Employment Act case need show only that age was a determinative cause (as opposed to the sole cause) of the challenged action. Relying on our prior decision in *Griffiths v. CIGNA*, 988 F.2d 457 (3d Cir.), *cert. denied*, 114 S.Ct. 186 (1993), the district court in this case

II.

A. 1. We first consider Sheridan's argument that the district court erred in granting duPont's motion for judgment as a matter of law. With respect to this question, we exercise plenary review. *Seman v. Coplay Cement Co.*, 26 F.3d 428, 431 (3d Cir. 1994). "Such a motion should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993) (citation omitted). "Although judgment as a matter of law should be granted sparingly, a scintilla of evidence is not enough to sustain a verdict of liability. 'The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party.' " *Id.* (citation omitted) (quoting *Patzig v. O'Neil*, 577 F.2d 841, 846 (3d Cir. 1978)).

2. We begin by considering duPont's argument that the evidence was insufficient to show that Sheridan was constructively discharged. Although the district court did not grant judgment as a matter of law on this basis,

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instructed the jury that it had to find that Sheridan's gender was the sole cause of her constructive discharge, and the jury apparently found that this higher standard had been met. But in granting duPont's motion for judgment as a matter of law the district court held that the evidence of sex discrimination was insufficient even under the lesser *Miller* standard.

duPont argues in effect that we should affirm the district court on this alternative ground.

In *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 887-88 (3d Cir. 1984), our court recognized the concept of "constructive discharge" for Title VII purposes. As we observed, "[c]lassifying a termination as a constructive discharge rather than a voluntary quit has significant ramifications with respect to the scope of relief." *Id.* at 887. Noting that some courts of appeals had apparently "required a finding that the discrimination complained of amounted to an intentional course of conduct calculated to force the victim's resignation," we rejected this approach and adopted "an objective standard" requiring a finding that "the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." *Id.* at 887-88. We have applied this test in subsequent cases. *See, e.g., Clowes v. Allegheny Valley Hospital*, 991 F.2d 1159 (3d Cir.), *cert. denied*, 114 S.Ct. 441 (1993); *Gray v. York Newspapers, Inc.*, 957 F.2d 1070 (3d Cir. 1992); *Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227 (3d Cir. 1988). We are bound to apply this standard here.

Applying the *Goss* test and our subsequent precedents, we agree with the district court that there was adequate evidence to establish a constructive discharge in this case. Sheridan offered evidence that, when viewed in the light most favorable to her, would support a finding that Dougherty's evidence was fabricated. Moreover, Sheridan's situation was aggravated by the fact that most of her staff knew about the investigation and might interpret her acceptance of a transfer as an acknowledgment of guilt. Sheridan also presented evidence from which a

reasonable trier of fact could infer that the new positions offered to her would have represented demotions and that she would have effectively lost the opportunity for promotion or pay raises. Taken as a whole, the evidence of constructive discharge was sufficient.

3. We thus turn to the question whether, as the district could [sic] held, there was insufficient evidence under *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993), to show that Sheridan's gender was a determinative cause of the constructive discharge. As Sheridan argues, it appears that she made out a prima facie case of gender discrimination by showing (a) that she is a woman, (b) that she was qualified for the position of head captain, (c) that she was constructively discharged, and (d) that she was replaced by a man. *See, e.g., Waldron v. SL Industries, Inc.*, 56 F.3d 491, 494 (3d Cir. 1995). Under *Hicks*, Sheridan contends, "[t]hat prima facie showing, coupled with the jury's ability to find that the reason offered [by duPont] was a pretext, permitted the jury to find that sex discrimination had occurred." Appellant's Br. at 27 (footnote omitted).

In *Hicks*, the plaintiff claimed that he had been demoted and discharged because of race. He established a prima facie case, the employer offered legitimate reasons for the demotion and discharge, and the district court, sitting as the trier of fact, found the employer's reasons to be pretextual. *Hicks v. St. Mary's Honor Center*, 756 F. Supp. 1244, 1251 (E.D.Mo.1991). The court noted, however, that the plaintiff bore the ultimate burden of proving that race was a determinative factor. *Id.* Finding that the plaintiff had failed to prove that the employer's

conduct was racially rather than personally motivated, the court found in favor of the employer. *Id.* at 1252.

The court of appeals reversed, stating that "[o]nce plaintiff proved all of defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law. . . . No additional proof of discrimination is required." *Hicks v. St. Mary's Honor Center*, 970 F.2d 487, 492-93 (8th Cir. 1992). Thus, the court of appeals directed the district court to enter judgment in favor of the plaintiff. *Id.* at 493.

The Supreme Court granted certiorari to determine whether the factfinder's rejection of the employer's proffered reasons mandated a finding for the plaintiff. *Hicks*, 113 S.Ct. at 2745. The Court began its analysis with a review of the burden-shifting scheme established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this scheme, the establishment of a prima facie case creates a presumption that the employer unlawfully discriminated against the employee. *Hicks*, 113 S.Ct. at 2747. To overcome this presumption, the employer must " 'clearly set forth, through the introduction of admissible evidence,' reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *Id.* at 2747 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 & n.8 (1981)). Once the employer satisfies this burden, the presumption raised by the prima facie case is "rebutted" and "drops from the case." *Id.*

The Court emphasized that once the presumption was rebutted, the plaintiff had to carry the ultimate burden of proving intentional discrimination at trial. The Court wrote:

> It is important to note . . . that although the *McDonnell Douglas* presumption shifts the burden of production to the defendant, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

Hicks, 113 S.Ct. at 2747 (quoting *Burdine*, 450 U.S. at 253). The Court continued:

> The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his race.

Hicks, 113 S.Ct. at 2749 (quoting *Burdine*, 450 U.S. at 253). The Court thus held that rejection of the defendant's proffered reasons does not compel judgment for the plaintiff. *Id.*

Hicks' implications when the defendant moves for summary judgment or judgment as a matter of law are less clear. Some courts of appeals have held that under *Hicks* a plaintiff will not necessarily survive summary judgment or judgment as a matter of law simply because the evidence is sufficient to permit a rational factfinder to disbelieve the employer's proffered reasons. *E.g., Rhodes v. Guiberson Oil Tools*, 39 F.3d 537, (5th Cir. 1994), *reh'g in banc granted*, 49 F.3d 127 (5th Cir. 1995); *Woods v. Friction*

Materials, Inc., 30 F.3d 255, 260-61 n.3 (1st Cir. 1994); *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994); *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 842-43 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 1398 (1994). However, other courts of appeals have disagreed. *E.g., Collier v. The Budd Company*, 66 F.3d 886, 893 n.11 (7th Cir. 1995); *EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993). *Cf. Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C.Cir. 1995), *cert. granted on other ground*, ___ S.Ct. ___, 64 U.S.L.W. 3068 (1/19/96); *Id.* at 1281 (statement of Williams, J., concurring in denial of rehearing in banc).

Our court is among those in the latter group. Relying on the statement in *Hicks* that the "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination," 113 S.Ct. at 2749, our court has taken the position that " 'if the plaintiff has pointed to evidence sufficient[ ] to discredit the defendant's proffered reasons, to survive summary judgment the plaintiff need not also come forward with additional evidence of discrimination beyond his or her prima facie case.' " *Waldron*, 56 F.3d at 495; (quoting *Fuentes*, 32 F.3d at 764) (brackets in *Waldron*). *See also Brewer v. Quaker State Oil Refining Corp.*, ___ F.3d ___, 1995 WL 737890 (3d Cir. Dec. 14, 1995); *Sempier v. Johnson & Higgins*, 45 F.3d 724, 731 (3d Cir.), *cert. denied*, 115 S.Ct. 2611 (1995). We are compelled to follow these precedents here.

Although these prior cases concerned motions for summary judgment rather than motions for judgment as a matter of law, we cannot distinguish them on that basis. The legal standard applied to a motion for summary

judgment mirrors that applied to a judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). It would make no sense to allow a plaintiff to defeat summary judgment and proceed to trial if the plaintiff's evidence could not sustain a judgment in his or her favor.

In this case, as the district court recognized, a rational trier of fact could have found that duPont's proffered reasons for the constructive termination were pretextual. We are therefore required under our court's precedents to reverse the entry of judgment as a matter of law in favor of duPont.

B. While we are bound to follow our court's prior interpretation of *Hicks* and while we acknowledge that that interpretation finds support in language in the *Hicks* opinion,[3] we question whether that interpretation is

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[3] *Hicks* stated:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination,[4] and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required."

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4. Contrary to the dissent's confusion-producing analysis, post, at 2761-2762, there is nothing whatever inconsistent between this statement and our later statements that (1) the plaintiff must show "both that

consistent with two of the fundamental principles on which Hicks rests.

The first of these is that, under the *McDonnell Douglas scheme*, the ultimate burden of persuasion rests at all times with the plaintiff. *See Hicks*, 113 S.Ct. at 2747. The second is that the "presumption" of discrimination that is created when the plaintiff makes out the elements of a prima facie case is governed by the "bursting bubble" theory. Under this theory,

> a presumption disappears when sufficient counterproof is offered. The trier may still find the presumed fact, but only if the natural probative force of the basic facts that brought the presumption into play is sufficient to support such a finding (or the evidence as a whole supports it). Otherwise, the presumed fact may not be found, and the presumption does not protect this possibility.

1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence*, § 71 at 334 (1994); *see also, e.g.*, 2 *McCormick on Evidence*, § 344 at 462-63 (4th ed. 1992).[4]

> the reason was false, and that discrimination was the real reason," *infra*, at 2752, and (2) "it is not enough . . . to disbelieve the employer," *infra* at 2754. Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, there must be a finding of discrimination.

113 S.Ct. at 2749 & n.4.

[4] That *Hicks* regards the *McDonnell Douglas* presumption as a "bursting bubble" presumption is shown by the following passages:

From these principles, it seems to follow that once a defendant satisfies its production burden and the *McDonnell Douglas* presumption "bursts," a court should no longer accord that framework or its elements any special significance but should instead focus directly on the central issue in the case – intentional discrimination. Thus, in deciding whether a defendant is entitled to summary judgment or judgment as a matter of law, the court should focus directly on the question whether there is sufficient evidence in the record to persuade a reasonable factfinder that intentional discrimination on the ground alleged by the plaintiff was a determinative cause of the challenged employment action. This approach, which focuses directly on the question of intentional discrimination, rather than continuing to view the record through the lens of *McDonnell Douglas*, appears to be what the Supreme Court had in mind when it said in *Hicks* that after the defendant satisfies its burden of production "the

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> "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted," *Burdine*, 450 U.S. at 255, 101 S.Ct. at 1094-95, and *"drops from the case," id.* at 255 n.10.

113 S.Ct. at 2747 (emphasis added).

> If . . . the defendant has succeeded in carrying its burden of production, the McDonnell Douglas framework – with its presumptions and burdens – *is no longer relevant*. . . . The presumption, having fulfilled its role of forcing the defendant to come forward with some response, *simply drops out of the picture*. [*Burdine*, 450 U.S.] at 255.

Id. at 2749 (emphasis added). *See also McKenna v. Pacific Rail Service*, 32 F.3d 820, 829 (3d Cir.1994); *Gomez v. Allegheny Health Services, Inc.*, 71 F.3d 1079 (3d Cir.1995).

McDonnell Douglas framework – with its presumptions and burdens – is no longer relevant" and should not be "resurrect[ed]." 113 S.Ct. at 2749.

Our court, however, has outlined a different approach. Instead of recognizing that the *McDonnell Douglas* framework is "no longer relevant" once the defendant has met its production burden, our approach continues to accord a special place to a central element of that framework – the defendant's proffered explanation. According to our cases, a plaintiff at this stage may defeat a summary judgment motion "by *either* (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." *Fuentes*, 32 F.3d at 764 (emphasis in original). If the plaintiff relies on the first method, our cases require the use of a complicated standard for determining whether the plaintiff's reasons have been sufficiently discredited. Under this standard, a plaintiff cannot defeat summary judgment "simply by arguing that the factfinder need not believe the defendant's proffered legitimate explanations," but the plaintiff need not "adduce evidence directly contradicting the defendant's proffered legitimate explanations." *Id.* at 764. "Rather, the nonmoving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.' " *Id.* at 765 (citation omitted). "[T]he plaintiff cannot simply show that the employer's decision was wrong or mistaken," but "[o]f

course, a decision foolish, imprudent, or incompetent by comparison to the employer's usual mode of operation can render it implausible, inconsistent, contradictory, or weak." *Id.* at 765 & n.8. Moreover, when the employer asserts that the challenged action was taken for several reasons, the evidence "must allow a factfinder reasonably to infer that *each* of the employer's proffered non-discriminatory reasons . . . was either a *post hoc* fabrication or otherwise did not actually motivate the employment action." *Id.* (citations omitted). But "[i]f the defendant proffers a bagful of legitimate reasons, and the plaintiff manages to cast substantial doubt on a fair number of them, the plaintiff may not need to discredit the remainder." *Id.* at 764 n.7.

Although elaborate, *Fuentes'* discussion of proof that tends to discredit the defendant's reason(s) still does not fully capture the relationship between such proof and the plaintiff's ultimate burden of establishing intentional discrimination. As we will try to show below, the degree to which evidence discrediting an employer's explanation tends to show discrimination on the ground alleged by the plaintiff depends on a number of other factors that will vary from case to case. Accordingly, we believe that, once the defendant in a *McDonnell Douglas* case has shouldered the production burden, the court, in ruling on a defense motion for summary judgment or judgment as a matter of law, should inquire directly whether, based on all of the evidence in the record when viewed in the light most favorable to the plaintiff, a reasonable trier of fact could find that discrimination on the ground alleged was, more likely than not, a determinative cause of the action

at issue. This inquiry will require an assessment of four categories of evidence.

First, there is the inference of discrimination that naturally arises from the elements of the prima facie case. The strength of this inference, however, will vary from case to case. In some cases, it will be substantial. (An example is the *McDonnell Douglas* case itself, in which a black man had engaged in a civil rights protest against the employer who denied him a position in 1964 in favor of a white applicant.) In other cases, however, the inference of discrimination that naturally arises from the elements of the prima facie case will be weak. (An example is the age discrimination case in which one middle-aged person is hired, promoted, etc., instead of another somewhat older middle-aged person. *See, e.g., Barber v. CSX Distribution Services,* 68 F.3d 694 (3d Cir. 1995).) We think that it is clear that the inference of discrimination naturally arising from the elements of a prima facie case will not always be enough to take a plaintiff to trial or to sustain a plaintiff's verdict.

Second, there is the inference of discrimination that may often be drawn from the ruling out of the employer's proffered reason(s). The degree to which such an inference is justified, however, is inversely proportional to the degree to which the record contains evidence of a third possible cause for the challenged employment action. For example, if it is certain that an employee was discharged for either reason "a" or reason "b" and no other, and if reason "b" can be ruled out, then obviously it may be inferred that the real reason for the discharge was "a." But if an employee was discharged for either reason "a," reason "b," or reason "c," then ruling out reason "b" does

not permit an inference that reason "a" was the real reason.

Cases in which the record contains strong evidence of a third explanation for the challenged action are by no means unknown. *See generally Miller v. CIGNA Corp.*, 47 F.3d 586, 597 (3d Cir. 1995) (in banc) (trier of fact may conclude that adverse employment action "was taken for a reason other than the reasons urged by the parties"). Perhaps the clearest of these cases are those in which the plaintiff challenges a single adverse employment action based on two or more alternative grounds. For example, an employee may claim that he or she did not get a promotion (1) because of gender and (2) because of handicap. If the record in such a case contains strong evidence of handicap discrimination, rejection of the employer's proffered reason (let us say inferior qualifications) will not by itself permit an inference that the employer's true reason was gender discrimination.

The degree to which a trier of fact can reasonably conclude that there was discrimination on the ground claimed by the plaintiff also depends upon the degree to which the trier of fact can reasonably reject the employer's reason(s). (It is important to bear in mind that acceptance or rejection of an employer's reasons need not be an all-or-nothing proposition.) The evidence in a particular case may be such as to justify only a marginal or partial disbelief or belief of the employer's reason(s). For example, a trier of fact might be justified in believing that it is more probable than not (but barely so) that the employer's explanation is false. Or, a trier of fact might be justified in believing that it is more probable than not (but barely so) that the employer's explanation is true. In

addition, a trier of fact might be justified in believing that the reason asserted by the employer was not the sole cause but was a partial cause (say a 20%, 40%, 60%, or 80% cause) for the challenged action. *See, e.g., id.* Or, if the employer asserts multiple reasons, the evidence might be such as to justify belief (to some degree) of some reasons but not others. All other things being equal, the more strongly and completely the trier of fact can rationally rule out the employer's reason(s), the more justified it is to conclude that there was discrimination on the ground alleged – and vice versa.

Third, disbelief of the employer's proffered reason(s) may also give rise to an inference that the employer was trying to conceal discrimination on the ground that the plaintiff claims. But the strength of this inference, too, will vary based on the facts. Its strength will depend on whether there is evidence in the record of some other possible explanation that the employer might not want to disclose (*e.g.*. in our prior hypothetical, handicap discrimination). In addition, its strength will obviously be proportional to the extent and strength of the trier of fact's disbelief of the employer's reason(s).

The fourth category of evidence that may remain after the *McDonnell Douglas* presumption "bursts" consists of any other relevant evidence of discrimination on the ground asserted. "[S]tray remarks in the workplace" that are insufficient to make out a Price Waterhouse case are an example. *See Price Waterhouse v. Hopkins,* 490 U.S. 228, 277 (1989) (O'Connor, J., concurring).

Based on the two fundamental principles noted at the outset – *i.e.,* that the plaintiff always bears the ultimate

burden of proving intentional discrimination on the ground alleged and that the *McDonnell Douglas* presumption "bursts" – it appears that when the defendant satisfies its production burden and the court must decide whether to grant summary judgment or judgment as a matter of law for the defendant, the court should decide whether in the particular case at hand the evidence in all of these four categories taken together could persuade a reasonable trier of fact by a preponderance of the evidence that discrimination on the ground alleged was a determinative cause of the challenged action.

If we were free in this case to apply this mode of analysis, we would discuss the evidence in some detail. For present purposes, however, we think that it suffices to say that we are inclined to agree with the district court's evaluation of the proof. However, since we are not free to employ this mode of analysis, we are required, as previously noted, to reverse the entry of judgment as a matter of law in duPont's favor.

III.

We must therefore consider whether the district court also erred when it granted duPont's motion for a new trial. Such a motion may be granted even if the evidence is legally sufficient to support the verdict. *Roebuck v. Drexel University*, 852 F.2d 715, 735 (3d Cir. 1988). A new trial is appropriate so long as the district court could "reasonably conclude[ ] that a miscarriage of justice would occur if the jury's verdict were left [to] stand." *Klein v. Hollings*, 992 F.2d 1285, 1290 (3d Cir. 1993) (quoting *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344,

1348 (3d Cir. 1991)) (citing *Shanno v. Magee Indus. Enters., Inc.*, 856 F.2d 562, 567 (3d Cir. 1988)). A trial court's decision to grant a new trial based on the weakness of the prevailing party's evidence is generally reviewed for an abuse of discretion. *Greate Bay Hotel & Casino v. Tose*, 34 F.3d 1227, 1235 (3d Cir. 1994); 9A Wright & Miller, *Federal Practice and Procedure* § 2540 at 378 (1995). The trial court deserves this deference because it is better able to weigh the evidence presented at trial. However, when it is argued that the district court's order was based on the application of incorrect legal precepts, we exercise plenary review with respect to that contention. *See generally Greate Bay Hotel*, 34 F.3d at 1235; *Rotondo v. Keene Corp.*, 956 F.2d 436, 438 (3d Cir. 1992).

In this case, the district court applied the correct legal standard when it granted duPont's motion. The court recognized that "[a] new trial cannot be granted . . . merely because the court would have weighed the evidence differently and reached a different conclusion." *Sheridan II* at 12 (quoting *Markovich v. Bell Helicopter Textron, Inc.*, 805 F. Supp. 1231, 1235 (E.D.Pa.), *aff'd*, 977 F.2d 568 (3d Cir. 1992)). Instead, the court stated, a new trial may be granted on the ground that the verdict was against the weight of the evidence when the failure to do so would result in injustice or shock the conscience of the court. Moreover, in assessing the evidence, the court recognized that disbelief of duPont's proffered reason was evidence of discrimination. Accordingly, we hold that the district court applied the correct legal precepts in ruling on duPont's new trial motion, and we therefore review this decision for an abuse of discretion.

Like the district court, we find little evidence of sex discrimination. Although there is evidence that management may have treated Sheridan unfairly, there is scant evidence that this was because she was a woman. Sheridan's testimony that Amblard would not address her in the company of her male supervisor and that he told her he would watch her like a "hawk" indicates little more than personal dislike. Although a man was promoted to manager of restaurants and a man replaced Sheridan as head captain of the Green Room, the record indicates that at all relevant times, two of the other four head captain positions at the hotel were filled by women. *Sheridan II* at 10. Based on this evidence, we cannot find that the district court abused its discretion in granting a new trial on the constructive discharge claim.[5]

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[5] The dissenting opinion concludes that the district court's new trial ruling was tainted by its decision on the motion for judgment as a matter of law. We disagree. In ruling on the motion for a new trial, the district court assumed that its order granting judgment as a matter of law would be reversed and, in the alternative, still granted the motion for a new trial. *Sheridan II* at 12 & n.11. We therefore do not agree that the new trial decision is undermined by our reversal of the order granting judgment as a matter of law.

The dissenting opinion also suggests that the district court may have failed to apply the complete test in ruling on the motion for a new trial. The dissent apparently is concerned that the district judge did not make an explicit finding that allowing the verdict to stand would effect a miscarriage of justice. Although such a finding would have been helpful for our review, the district court did recognize that a motion for a new trial should be granted on the ground that the verdict is against the weight of the evidence only " 'when the failure to do so would result in injustice, or would shock the conscience of the court.' " *Id.* at 12 (citation omitted). We do not see how this

IV.

We next consider whether the district court erred in dismissing the claims against Amblard, the hotel general manager, on the ground that Title VII does not impose liability on individual employees. App. 847-48. Title VII states that

> [i]t shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e-2(a)(1). The term "employer"

> means a person engaged in an industry affecting commerce who has fifteen or more employees . . . , and any agent of such a person. . . .

42 U.S.C. § 2000e(b).

Sheridan argues that these provisions permitted her to assert claims against Amblard. She notes that § 2000e(b) defines the term "employer" to include "any agent" of an employer, and she contends that Amblard was an "agent" of duPont. She also observes that under

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statement differs in any material way from the test set forth in the dissenting opinion, and we think that a finding that this standard had been satisfied was certainly implicit in the court's decision to grant the motion for a new trial. We therefore do not agree that the court misapplied the test governing the motion for a new trial.

the Civil Rights Act of 1991, a Title VII plaintiff may now obtain relief – compensatory damages – that a defendant such as Amblard is in a position to provide. *See* 42 U.S.C. § 1981a(a)(1).

Arguments such as Sheridan's have been considered by many of the other courts of appeals in cases under Title VII, as well as the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA"), which contain definitions of an "employer," 29 U.S.C. § 630(b) and 42 U.S.C. § 12111(5), that mirror that of Title VII. Many of these courts appear to have completely rejected the concept of employee liability. *See, e.g., Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-17 (2d Cir. 1995) (Title VII); *Gary v. Long*, 59 F.3d 1391, 1399 (D.C.Cir.) (Title VII), *cert. denied*, 116 S.Ct. 569 (1995); *Equal Employment Opportunity Commission v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1279-82 (7th Cir. 1995) (ADA); *Cross v. State of Alabama*, 49 F.3d 1490, 1504 (11th Cir. 1995) (Title VII) (citing *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (Title VII)); *Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995) (Title VII and ADEA); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir.) (Title VII),[6] *cert. denied*, 115 S.Ct. 574 (1994); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (Title VII and ADEA), *cert. denied*, 114 S.Ct. 1049 (1994).[7]

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[6] An earlier Fifth Circuit case that seemed to reach a contrary result, *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986), has been held to be "nonauthoritative." *Harvey v. Blake*, 913 F.2d 226, 228 n.1 (5th Cir. 1990).

[7] In addition, the Fourth Circuit has rejected such claims against employees based on "personnel decisions of a plainly delegable character." *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d

Among other things, the decisions rejecting employee liability note that Title VII's definition of an "employer"

507, 510-511 & n.1 (4th Cir.), *cert. denied*, 115 S.Ct. 666 (1994); *see also Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989) (employee may be individually liable for sexual harassment), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (*in banc*). The law in the Sixth and Tenth Circuits is less clear. For the Sixth Circuit, *see, e.g., Jones v. Continental Corp.*, 789 F.2d 1225, 1231 (6th Cir. 1986) (statement, in discussion of award of attorney's fees, that Title VII claims may be asserted against employees); *Romain v. Kurek*, 772 F.2d 281 (6th Cir. 1985); *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360 (6th Cir. 1982); *see generally Winston v. Hardee's Food Systems, Inc.*, 903 F.Supp. 1151 (W.D. Ky. 1995) (noting absence of controlling Sixth Circuit authority, collecting cases, and holding no employee liability under Title VII); *Johnson v. University Surgical Group*, 871 F. Supp. 979, 981-86 (S.D.Ohio 1994) (noting absence of controlling Sixth Circuit authority, collecting cases, and holding employee may be liable under Title VII). For the Tenth Circuit, *see, e.g., Ball v. Renner*, 54 F.3d 664, 668-69 (10th Cir. 1995) (holding employee not individually liable at least where he or she does not exercise employer-like functions); *Lankford v. City of Hobart*, 27 F.3d 477, 480 (10th Cir. 1994) (no employee liability); *Brownlee v. Lear Siegler Management Services Corp.*, 15 F.3d 976, 978 (10th Cir.) (dictum that employees may be liable under ADEA), *cert. denied*, 114 S.Ct. 2743 (1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1124-25 (10th Cir. 1993) (holding that claim against employee must be deemed to be in official capacity). The First and Eighth Circuits have not yet addressed the issue. *See Lenhardt v. Basic Institute of Technology, Inc.*, 55 F.3d 377, 380 (8th Cir. 1995) (not reaching issue of employee liability under Title VII, but interpreting similar state statute to preclude employee liability); *Weeks v. State of Maine*, 871 F. Supp. 515, 516 (D.Me.1994) (noting lack of First Circuit precedent). Also, numerous district court decisions from this circuit have reached the same conclusion and found no employee liability, *see, e.g., Ascolese v. SEPTA*, 902 F. Supp. 533 (E.D. Pa. 1995); *Clark v. Commonwealth of Pennsylvania*, 885 F. Supp. 694 (E.D. Pa. 1995); *Caplan v.*

predates the Civil Rights Act of 1991; that before the passage of that Act, Title VII did not permit compensatory or punitive damages; and that the equitable remedies, including back pay, that were then available were directed against the employer. *AIC Security Investigations, Ltd.*, 55 F.3d at 1281; *Miller*, 991 F.2d at 587 n.2; *Grant*, 21 F.3d at 652-53. From these facts, it has been inferred that prior to 1991, an employee could not be sued, and it has been noted that Congress did not indicate any desire to change this rule when it passed the 1991 Act. *Id.* On the contrary, it has been argued that the statutory scheme of the 1991 Act affirmatively indicates that Congress assumed that employees would not be sued under Title VII. In passing the 1991 Act, Congress limited damages available based upon the size of the defendant. Under § 1981a(b)(3),

> [t]he sum of the amount of compensatory damages awarded . . . shall not exceed . . .
>
> > (A) in the case of a respondent who has more than 14 and fewer than 101 employees . . . $50,000;
> >
> > (B) in the case of a respondent who has more than 100 and fewer than 201 employees . . . $100,000;

Fellheimer Eichen Braverman & Kaskey, 882 F. Supp. 1529 (E.D. Pa. 1995); *Verde v. City of Philadelphia*, 862 F. Supp. 1329 (E.D. Pa. 1994), although several other courts have reached the opposite result, *see, e.g., Doe v. William Shapiro, Esq., P.C.*, 852 F. Supp. 1246 (E.D. Pa. 1994); *Dreisbach v. Cummins Diesel Engines, Inc.*, 848 F. Supp. 593 (E.D. Pa. 1994).

> (C) in the case of a respondent who has more than 200 and fewer than 501 employees . . . $200,000; and
>
> (D) in the case of a respondent who has more than 500 employees . . . $300,000.

42 U.S.C. § 1981a(b)(3). This section, it has been argued, suggests that Congress did not contemplate a respondent who was not an employer. *See AIC Security*, 55 F.3d at 1281; *Miller*, 991 F.2d at 587 n.2; *see also Ascolese v. SEPTA*, 902 F. Supp. at 540-41. While reasonable arguments in favor of the contrary position can be made, *see Miller*, 991 F.2d at 588-90 (Fletcher, J., dissenting); *Tomka*, 66 F.3d at 1318-24 (Parker, J., dissenting), we follow the great weight of authority from other courts of appeals and hold that an employee cannot be sued. We therefore affirm the dismissal of Sheridan's claims against Amblard.

V.

We next consider whether the district court erred in granting in part duPont's motion in limine to preclude certain evidence. Sheridan had sought to introduce testimony by co-worker Mary Deptula regarding a suggestive remark that was allegedly made by Amblard when he saw a woman in a tight dress. Deptula would also have testified that one day when she volunteered to park cars, Amblard told her that she could not do so because she was a woman. App. 1520-21. The district court found these statements to be "prejudicial and irrelevant" and granted the defendants' motion in limine to exclude testimony concerning them under Federal Rules of Evidence 401 and 403. App. 44.

We generally review district court rulings concerning Rule 403 for an abuse of discretion. *Glass v. Philadelphia Electric Co.*, 34 F.3d 188, 191 (3d Cir. 1994). However, when the district court "failed to explain its grounds for [deciding] a Rule 403 [motion] and its reasons for doing so are not otherwise apparent from the record, . . . we may undertake to examine the record and perform the required balancing ourselves." *United States v. Himelwright*, 42 F.3d 777, 781 (3d Cir. 1994) (citations omitted).

In this case, we need not decide the appropriate standard of review because we conclude that under either standard the district court properly excluded the testimony under Rule 403. Amblard's comments had little probative value as to whether he had a gender-based animus against Sheridan and whether this animus was a determinative factor in any of the actions taken. *See Hook v. Ernst & Young*, 28 F.3d 366, 369, 376 (3d Cir. 1994). On the other hand, these comments raise a substantial danger of unfair prejudice. Thus, we hold that the district court properly excluded Deptula's testimony under Rule 403.

Sheridan also sought to admit testimony by coworker April Akers that Amblard complimented many of the men on the staff but never complimented Sheridan or the other women. App. 1515; *see also* Appellant's Br. at 38-39. The defendants, however, claim that Sheridan never sought to admit this portion of Akers's deposition testimony into evidence. Defs.' Br. at 28 n.6. Sheridan has not provided a record citation showing that she attempted to introduce this evidence. Sheridan's only

reference is to a court order precluding Akers from testifying as to (1) Sheridan's qualifications and job performance and (2) rumors that Sheridan was stealing from the hotel. App. 43. In this order, the court did not address the testimony by Akers that Sheridan now seeks to admit. Thus, we do not believe that Sheridan raised this claim at trial, and in any event she has not properly presented this argument on appeal. *See* Third Circuit Local Appellate Rule 28.1(a)(i)(1).

VI.

Sheridan's final two arguments do not require extended discussion. Sheridan contends that defense counsel's use of a peremptory challenge based on the age of a member of the venire violated equal protection. For the reasons explained in our opinion in *Pemberthy v. Beyer*, 19 F.3d 857, 870 & n.18 (3d Cir.), *cert. denied*, 115 S. Ct. 439 (1994), we hold that this strike was permissible.

Sheridan also maintains that defense counsel improperly vouched for the credibility of certain witnesses during summation and that the district court should have instructed the jury to disregard those statements. However, assuming for the sake of argument that defense counsel's remarks were objectionable, we hold that a new trial on Sheridan's denial-of-promotion and retaliation claims is not warranted.

VII.

For the reasons stated, we reverse the district court's entry of judgment in favor of duPont on the constructive

discharge claim, but we affirm the court's decision to grant duPont's motion for a new trial on that claim. We affirm the judgment against Sheridan on her claims against Amblard and her denial-of-promotion and retaliation claims. We also hold that the district court properly granted duPont's in limine motion to exclude evidence, and we remand this case to the district court for further proceedings consistent with this opinion.

SLOVITER, *Chief Judge*, concurring in the judgment reversing the entry of judgment as a matter of law and dissenting from the judgment affirming the grant of a new trial.

I.

Although I join in the majority's conclusion that the judgment as a matter of law on Sheridan's constructive discharge claim should be reversed, I cannot join in much of its language in doing so, particularly its suggestion that this court has taken a wrong path in its series of opinions interpreting the Supreme Court's opinion in *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993).

In *Hicks*, the Court was faced with a holding of a court of appeals that a factfinder's rejection of the defendant's proffered reason for its adverse employment action *compels* a judgment for the plaintiff. In concluding that it does not, the Court also explicitly stated that such a finding *permits* the factfinder to draw the inference that the defendant intentionally discriminated against the plaintiff. Thus, we have read *Hicks* to establish that the disbelief of the defendant's proffered reasons is the threshold finding, beyond which the jury is permitted but

not required to draw the inference of intentional discrimination. *See* 113 S.Ct. at 2749. In *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994), from which the majority seeks to disassociate, we stated that a plaintiff survives summary judgment by producing sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action.

As the majority recognizes, numerous other courts have likewise interpreted the Supreme Court's decision in *Hicks*. *See e.g., Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C.Cir. 1995) ("According to *Hicks*, a plaintiff need only establish a prima facie case and introduce evidence sufficient to discredit the defendant's proffered nondiscriminatory reasons; at that point, the factfinder, if so persuaded, may infer discrimination."), *petition for cert. filed*, 64 U.S.L.W. 3068 (U.S. Jul. 3, 1995) (No. 95-27); *EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) ("A finding of pretextuality allows a juror to reject a defendant's proffered reasons for a challenged employment action and thus permits the ultimate inference of discrimination."); *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) ("Hicks clarified that the only effect of the employer's nondiscriminatory explanation is to convert the inference of discrimination based upon the plaintiff's prima facie case from a mandatory one which the jury *must* draw, to a permissive one the jury *may* draw, *provided* that the jury finds the employer's explanation 'unworthy' of belief."); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123-24 (7th Cir. 1994) ("The Court [in Hicks] explicitly states that the plaintiff *may* prevail in a discrimination case by establishing a prima facie case and by

showing that the employer's proffered non-discriminatory reasons for her demotion or discharge are factually false."); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) ("[A]s *St. Mary's* recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a *prima facie* case and showing of pretext without anything more. . . . ").

Instead of following this precedent, the majority would require, at least in some cases, evidence beyond that establishing the prima facie case and supporting the factfinder's rejection of the defendant employer's proffered reasons in order to find that plaintiff has met his or her burden of showing intentional discrimination. The majority offers no guidance as to what specific additional evidence would be required, but rather would allow the district court to base its determination on its own evaluation of the following four considerations: 1) the strength of the inference of discrimination arising from the elements of the prima facie case; 2) the degree to which an inference of discrimination drawn from the rejection of the employer's proffered reasons is justified; 3) the strength of the inference "that the employer was trying to conceal discrimination," and 4) any other evidence of discrimination on the ground asserted.

However, the imposition of such an additional evidentiary requirement is directly contrary to the Supreme Court's statement in *Hicks* that "rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such rejection, '[n]o additional proof of discrimination is *required*.' " 113 S.Ct. at 2749 (emphasis in original) (citation omitted). Although the majority sees a

conflict between this statement and the requirement that the plaintiff must prove intentional discrimination, the Court in Hicks believed otherwise, stating that "there is nothing whatever inconsistent between this statement and our later statements that (1) the plaintiff must show '*both* that the reason was false, *and* that discrimination was the real reason,' and (2) 'it is not enough . . . to *dis*believe the employer'." *Id.* at 2749 n.4 (citations omitted) (emphasis in original). The Court explained that "even though . . . rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*" *Id.* (emphasis in original).

The reasons why the factfinder should be entitled to infer intentional discrimination from this evidence appear from the relevant caselaw. We have repeatedly acknowledged the difficulty of proving intentional discrimination in Title VII cases. *See, e.g., Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir.) (in banc), *cert. dismissed*, 483 U.S. 1052 (1987); *Dillon v. Coles*, 746 F.2d 998, 1003 (3d Cir. 1984). "This is true in part because . . . discrimination . . . is often subtle." *Chipollini*, 814 F.2d at 899. As the Supreme Court has recognized, "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *United States Postal Serv. Bd. of Govs. v. Aikens*, 460 U.S. 711, 716 (1983). We have tied the Supreme Court's establishment of a distinct method of proof in employment discrimination cases, that relies on presumptions and shifting burdens of production, to the Court's recognition that direct evidence of an employer's motivation will often be unavailable or

difficult to acquire. *See Chipollini*, 14 F.2d at 897; *Dillon*, 746 F.2d at 1003.

The initial presumption of discrimination arises from the plaintiff's prima facie case of discrimination "because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). I assume that the same logic, albeit unarticulated, was the basis for the Supreme Court's statement in *Hicks* that disbelief of the employer's reason will *permit* the factfinder to infer the ultimate fact of discrimination, *see Hicks*, 113 S.Ct. at 2749, even though the presumption "drops from the case" after the defendant proffers a legitimate reason. *Texas Dept. of Community Affs. v. Burdine*, 450 U.S. 248, 255 & n.10 (1981).

The fact that the issue arises here in the context of a motion for judgment as a matter of law rather than for summary judgment should make no difference. Because a finding of intentional discrimination generally depends heavily on assessments of the credibility of witnesses and those credibility assessments are traditionally left to the jury, it follows that the jury must be permitted to draw the inference of intentional discrimination from its negative credibility finding. *See Barber v. CSX Distribution Servs.*, 68 F.3d 694, 700 (3d Cir. 1995) ("Evaluation of witness credibility is the exclusive function of the jury, and where the only evidence of intent is oral testimony, a jury could always choose to discredit it." (quoting *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 262 (3d Cir. 1987))). *See also Aikens*, 460 U.S. at 716 ("It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much

a fact as anything else." (quoting *Edgington v. Fitzmaurice*, 29 Ch.Div. 459, 483 (1885))); *Chipollini*, 814 F.2d at 899 ("The issue of the defendant's intent at the time of the plaintiff's discharge is clearly a factual question.").

The majority seems to believe that this court's focus on the credibility of the defendant's proffered explanation impermissibly gives continuing weight to the presumption of discrimination created by the prima facie case even after the *McDonnell Douglas* presumption "bursts." However, I see nothing that undermines the "bursting" of the presumption. The *McDonnell Douglas* prima facie case is used only to move the plaintiff's case past the pleadings stage. Once defendant has satisfied its burden under *Burdine* to articulate a nondiscriminatory reason for the employment decision, and plaintiff has cast doubt on that reason, the case then moves from the summary judgment stage to the factfinder. It is at that stage that the credibility of the defendant's proffered explanation may play a significant – even a determinative – role.

As the Court stated in *Hicks*, "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." 113 S.Ct. at 2749. *Fuentes* and our later cases have reasonably concluded from this statement that a plaintiff who has made out a prima facie case may defeat an adverse judgment by the court by producing evidence from which a factfinder might discredit the defendant's proffered reasons.

The majority is mistaken in its view that basing a finding of intentional discrimination on the jury's rejection of the employer's explanatior. together with the facts supporting the prima facie case is inconsistent with the bursting of the presumption. In *Burdine* itself, the Supreme Court made clear that "[i]n saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. . . . [T]his evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual." *Burdine*, 450 U.S. at 255 n.10.

Much of the majority's discussion is predicated on its concern that an employer may proffer a false reason for its actions, not to conceal the discrimination alleged but rather to conceal a different form of discrimination or some other unlawful conduct. The courts should not base their decisions on such a hypothesis. We routinely expect a party to give honest testimony in a court of law; there is no reason to expect less of a defendant charged with unlawful discrimination. If a defendant fails to come forward with the true and credible explanation, there is no policy to be served by refusing to permit the jury to infer that the real motivation is the one that the plaintiff has charged.

In sum, I continue to believe that this court's interpretation of *Hicks*, as stated in *Fuentes, Waldron v. SL Indus., Inc.*, 56 F.3d 491 (3d Cir. 1995); *Sempier v. Johnson & Higgins*, 45 F.3d 724 (3d Cir.), *cert. denied*, 115 S.Ct. 2611 (1995), and most recently in *Brewer v. Quaker State Oil Ref. Corp.*, No. 95-3101, 1995 WL 737890 (3d Cir. Dec. 19,

1995), is true to the language and holding of *Hicks* and the principles upon which it rests.

This does not mean that the courts in discrimination cases lose their traditional obligation to review the sufficiency of the showing on which summary judgment may be based or, if the issue is judgment as a matter of law, the adequacy of the showing plaintiff made to the factfinder. In both such instances, the district court must determine whether the plaintiff has cast sufficient doubt upon the employer's proffered reasons to permit a reasonable factfinder to conclude that the reasons are incredible. *See, e.g., Fuentes,* 32 F.3d at 764-765; *Ezold v. Wolf, Block, Schorr & Solis-Cohen,* 983 F.2d 509, 523, 531, 533 (3d Cir. 1992), *cert. denied,* 114 S.Ct. 88 (1993). But once the court is satisfied that the evidence meets this threshold requirement, it may not pretermit the jury's ability to draw inferences from the testimony, including the inference of intentional discrimination drawn from an unbelievable reason proffered by the employer. For these reasons, I agree that the judgment for duPont as a matter of law must be reversed.[1]

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[1] As to the dismissal of the claims against Amblard on the ground that Title VII does not impose personal liability on individual employees, although I find the reasoning of Judge Fletcher and Judge Parker convincing, *see Miller v. Maxwell's Int'l Inc.,* 991 F.2d 583, 588-90 (9th Cir. 1993) (Fletcher, J., dissenting); *Tomka v. Seiler Corp.,* 66 F.3d 1295, 1318-24 (2d Cir. 1995) (Parker, J., dissenting), the majority correctly notes that the great weight of authority from other courts of appeals is otherwise, and I see no purpose to dissent from the court's judgment on this issue.

II.

However, I respectfully disagree that we should affirm the order granting a new trial and instead would remand so that the district court can reconsider that issue. The district court's explanation for its grant of a new trial was brief, inasmuch as its ruling focused primarily on its decision to grant defendant's motion for judgment as a matter of law. The court noted in a footnote that it was obliged under Rule 50(c) to make a conditional ruling on the defendant's motion for a new trial. To comply with that requirement, the court stated merely that it "would gran the motion for a new trial because the jury's verdict is contrary to the weight of the evidence." D.Ct. Opinion at 12 n.11.

The majority would affirm the grant of a new trial, noting that the court "applied the correct legal precepts." Majority Opinion at 21. I am less confident than the majority that this is so. If the majority is suggesting that the district court made no error of law in its post-trial rulings, this statement would be inconsistent with our ruling that the district court made a substantial error of law in its understanding of the quantum of evidence that is needed to uphold a jury's verdict. The district court based its grant of judgment as a matter of law on its understanding that "[i]n order to demonstrate that gender was a motivating factor, plaintiff would have to point to some evidence that that was the motive of those in the decision-making process. No such evidence exists in the record." D.Ct. Opinion at 11-12. This substantial legal error is the basis for our decision today to reverse the district court's grant of judgment as a matter of law.

The district court was clearly operating under the misconception that direct evidence of discriminatory intent was necessary to sustain the jury's verdict. It seems likely that the court's conclusion that specific evidence of gender discrimination was necessary led ineluctably to its conditional new trial ruling. However, because such evidence is not a prerequisite to a finding of discrimination, I believe the district court should be given the opportunity to reconsider whether a new trial is warranted in light of the correct legal principles.

I believe it is also unclear whether the district court applied the complete test for ruling on a new trial motion. In granting that motion, the district court merely concluded that the jury's verdict was contrary to the weight of the evidence. I recognize that a new trial may be granted even if the evidence is legally sufficient to support the verdict. *Roebuck v. Drexel Univ.*, 852 F.2d 715, 735 (3d Cir. 1988). However, we have cautioned that a district court should grant a new trial on the basis that the verdict was contrary to the weight of the evidence "only where a miscarriage of justice would result if the verdict were to stand." *Williamson v. Consol. Rail Corp.*, 926 F.2d 1344, 1352 (3d Cir. 1991). We have explained that this stringent standard is necessary to ensure that a district court "does not substitute its 'judgment of the facts and the credibility of the witnesses for that of the jury.' " *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 211 (3d Cir. 1992) (quoting *Lind v. Schenley Indus. Inc.*, 278 F.2d 79, 90 (3d Cir. 1960)), *cert. denied*, 113 S.Ct. 1285 (1993). "Such an action effects a denigration of the jury system and to the extent that new trials are granted the

judge takes over, if he does not usurp, the prime function of the jury as the trier of facts." *Id.*

Therefore, before imposing on Sheridan the burden and expense of a new trial, I would remand to require the district court to determine whether, inasmuch as Sheridan was not obliged to produce direct evidence of discriminatory intent, the jury's verdict for Sheridan was against the great weight of the evidence and would effect a miscarriage of justice.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BARBARA R. SHERIDAN, Plaintiff, v. E.I. DuPONT de NEMOURS & COMPANY, INC., a Delaware corporation, Defendant.	)	C.A. No. 93-46-SLR

Thomas S. Neuberger, Esquire, attorney for plaintiff.

Richard Allen Paul, Esquire, and Catherine Hagerty Thompson, Esquire, of E. I. DuPont de Nemours & Company, Inc., attorneys for defendant.

MEMORANDUM OPINION

Dated: July 14, 1994

Wilmington, Delaware

/s/ Sue L Robinson
ROBINSON, District Judge

INTRODUCTION

Presently before the Court are several post trial motions filed by both parties in this litigation. Each party has filed both a motion for judgment as a matter of law or in the alternative for a new trial (D.I. 179, 182), pursuant to Fed.R.Civ.P. 50(b), and a motion for attorney's fees (D.I. 175, 181), pursuant to Section 2000e-5(k), Title 42 of

the United States Code. In its motion for judgment as a matter of law, defendant prays this Court to overturn the jury verdict in favor of plaintiff for her constructive discharge claim (Count III). Defendant also seeks this Court to overturn the jury determination that plaintiff only partially failed to mitigate her damages. Finally, defendant argues that it is the prevailing party in this litigation and, because plaintiff's action was meritless and frivolous, the Court should award it attorneys' fees and costs.

In plaintiff's motion for judgment as a matter of law, she argues that defense counsel's personal vouching during his closing argument improperly influenced the jury, requiring a judgment as a matter of law on the issue of mitigation of damages. With respect to her motion for attorney's fees, plaintiff argues that, as the prevailing party, plaintiff has right to reasonable attorney's fees.[1]

BACKGROUND

Plaintiff filed a complaint against defendant E.I. DuPont de Nemours & Company, Inc. on January 26, 1993, alleging sexual discrimination by the following conduct: (1) in September 1991, defendant failed to promote her from the position of Head Captain of the breakfast/lunch shift of the Green Room of the Hotel duPont to the position of Manager of Restaurants; (2) after she verbally

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[1] Upon filing this motion, plaintiff also moved for an extension of time to file an appeal, pursuant to Fed.R.Civ.P. 58. However, subsequent to that filing, both parties filed timely motions pursuant to Fed.R.Civ.P. 50(b) which automatically tolls the time for appeal. Fed.R.App.P. 4(a) (4). Thus, this aspect of plaintiff's motion is moot.

complained in September and October of 1991 about not being promoted because of her gender, defendant retaliated against her by placing her on probation on November 10, 1991, and thereafter by conducting an investigation of her "comping" practices[2] which ultimately led to her reassignment; and (3) the above-described conduct on the part of defendant resulted in making plaintiff's working conditions so intolerable that she felt forced to resign.

After a six-day jury trial, the jury advised the Court that plaintiff was not qualified for a promotion to the position of Manager of Restaurants.[3] With respect to the retaliation claim, the jury advised the Court that the defendant did not intentionally retaliate against plaintiff before November 20, 1991, and held that defendant also did not do so after November 20, 1991. Finally, the jury held that defendant did constructively discharge plaintiff because she was a woman. The jury also awarded plaintiff $17,500 in compensatory damages, but found that she failed to mitigate her damages by $33,000. (D.I. 158)

The Court adopted the jury's advisory verdict as its own, finding that plaintiff failed to prove that she was

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[2] "Comping" refers to the practice of giving complimentary food and beverage items to customers.

[3] Although the jury heard all of the evidence presented, it rendered advisory verdicts on plaintiff's failure to promote claim and on her retaliation claim, the facts of which predated November 21, 1991, the effective date of the 1991 amendments to Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.*, which amendments first gave plaintiffs in sexual discrimination cases, *inter alia*, the right to a jury trial and the right to request compensatory and punitive damages.

qualified for the position of Manager of Restaurants. With respect to the retaliation claim, the Court found the following:

> 8. Plaintiff did not provide by a preponderance of the evidence the existence of a causal link between the adverse employment action and the exercise of the protected activity.
>
> 9. Therefore, plaintiff failed to prove that defendant intentionally discriminated against her through retaliatory conduct following her complaining to Jacques Amblard that she was not given the Manager of Restaurants promotion because she was a woman.
>
> 10. In any event, plaintiff failed to prove by a preponderance of the evidence in this pretext case that discriminatory intent on the part of defendant was the sole cause of the employment actions (failure to promote, probation) taken against her.

(D.I. 172 at 6) The Court awarded plaintiff $18,072 in back pay compensation and $12,768 in front pay compensation. (D.I. 173)

DISCUSSION

A. Defendant's Motion for Judgment as a Matter of Law or, In the Alternative, for a New Trial

Fed.R.Civ.P.50(b) allows a party to move for judgment as a matter of law within ten days of the entry of final judgment, provided that the party moved for such a

judgment at the close of evidence.[4] In reviewing such a motion, the Court must analyze the evidence "in the light most favorable to the party securing the verdict, drawing all reasonable inferences that the jury might have drawn to support its decision." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1480 (3d Cir. 1990) (*quoting Rich v. U.S. Lines*, 596 F.2d 541, 544 fn.3 (3d Cir. 1979)). The Court must determine whether the record contains "the minimum quantum of evidence from which the jury might reasonably afford relief." *Keith v. Truck Stops Corp. of America*, 909 F.2d 743, 745 (3d Cir. 1990). When evidence is contradictory, a motion for judgment as a matter of law should not be granted. The jury must weigh the evidence, if the evidence is in dispute, because 'evaluation of witness credibility is the exclusive function of the jury.' " *Markovich v. Bell Helicopter Textron, Inc.*, 805 F.Supp. 1231, 1235 (E.D.Pa. 1992), *aff'd* 977 F.2d 568 (3d Cir. 1992) (*quoting Bhaya v. Westinghouse Electric Corp.*, 832 F.2d 258, 262 (3d Cir. 1987)).

1. Claims Are Independent

Defendant makes several arguments, with varying degrees of legitimacy, in support of its position that the jury verdict for plaintiff as to the constructive discharge claim was not reasonable. First, defendant asserts that the constructive discharge claim is an indispensable element of plaintiff's retaliation claim. (D.I. 182 at 12) As such, according to defendant, it was unreasonable for the jury

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[4] Defendant did move for judgment as a matter of law at the close of the plaintiff's case.

to find insufficient evidence for the retaliation claim, but sufficient evidence for the constructive discharge claim.[5]

Defendant's argument is fatally flawed. Defendant bases its argument on the fact that plaintiff has argued, and the Court has ruled, that the evidence of all three claims is interrelated. Defendant has taken a prior ruling by this Court addressing a distinct issue, and manipulated it to support its position. The Court's prior holding stated, not that the **claims** were dependant upon one another, but that the **evidence** to support each claim was **relevant** to the others, thereby justifying one trial for all three claims. (D.I. 134 at 4) Contrary to defendant's position, interrelation of evidence is not the same as interrelation of claims. Thus, the constructive discharge claim is not dependent upon the retaliation claim merely because evidence is relevant to both claims as an examination of the elements of each claim makes clear.

The elements of retaliation, as the jury was instructed, require the plaintiff to show: 1) she engaged in a protected activity; 2) she suffered adverse employment actions; and 3) a causal link exists between the employment action and the exercise of the protected activity. (D.I. 157 at 18) *See also Griffiths v. Cigna Corp.*, 988 F.2d 457, 468 (3d Cir. 1993), *cert. denied*, 114 S.Ct. 186 (1993). With respect to the constructive discharge claim, the jury was instructed that plaintiff must prove the following

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[5] As a threshold matter, defendant mischaracterizes the jury verdict. Defendant's position that the reason the jury found for defendant, i.e. that the jury "effectively concluded that no records were fabricated by Dupont," is speculation as to why the jury found no claim for retaliation.

elements: 1) the defendant intentionally made plaintiff's working conditions so intolerable that a reasonable person would have felt forced to resign; 2) plaintiff's gender was the sole motivating factor in the defendant's conduct; and 3) that plaintiff, in fact, resigned. (D.I. 157 at 21) *See also Clowes v. Allegheny Valley Hosp.*, 991 F.2d 1159 (3d Cir. 1993), *cert. denied*, 114 S.Ct 441 (1993). Because the retaliation count requires the adverse employment action to be the result of plaintiff's **complaints**, and the constructive discharge claim requires the discharge to be the result of plaintiff's **gender**, the two claims are not dependent. Therefore, the jury seems to have found that plaintiff failed to link the adverse employment action to her complaints, but did not fail to link her discharge to her gender.[6] Thus, the jury verdict does not fail because one claim is dependent on another.[7]

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[6] "It is the duty of the courts to attempt to harmonize the [special interrogatory] answers, if it is possible, under a fair reading of them: 'Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way.' " *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963) (*quoting Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd.*, 369 U.S. 355, 364 (1962).

[7] In defendant's brief, defendant also misconstrues both the Court's final ruling and the jury verdict with respect to the retaliation claim. The Court did not find, as defendant asserts, that "there were no conditions permitted or actions taken against the plaintiff which were solely motivated by discrimination." (D.I. 182 at 14) Rather, the Court found specifically that the flaw in plaintiff's claim was her failure to "provide by a preponderance of evidence the existence of a causal link between the adverse employment action and the exercise of the protected activity." (D.I. 172 at 6, ¶8) The Court also held that plaintiff failed to establish that gender was the

2. Special Interrogatories

Defendant next asserts that Special Interrogatory # 6 is plainly erroneous and cause for a mistrial because it fails to include the phrase "because she is a woman." (D.I. 182 at 16) The defendant seems willing to rest such a determinative motion on its two paragraph argument which cites absolutely no authority. The Court, however, is not.

Defendant fails to mention two key points. First, defendant, on the record, when asked directly by the Court, stated that it was satisfied with both the jury interrogatories and jury instructions, thus waiving any objection. *E.g., Kinnell v. Mid-Atlantic Mausoleums*, 850 F.2d 958, 963 fn. 6 (3d Cir. 1988). Furthermore, the jury was explicitly instructed that it could only find for the plaintiff on the constructive discharge claim if her gender was the sole reason for the discharge. Juries are presumed to have followed the instructions, thus making any possible lack in the interrogatories harmless. *E.g., Zafiro v. United States*, 113 S.Ct. 933, 939 (1993) (*citing Richardson v. Marsh*, 481 U.S. 200, 219 (1987)); *Kinnell*, 850 F.2d at 963 fn 6. Finally, in light of *Miller v. Cigna Corp.*, No. 93-1773, 1994 WL 283269 (3d Cir. June 28, 1994), defendant appears no longer entitled to such an instruction in the first place.

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sole cause of the employment actions, but specifically limited this holding to the employment actions of the failure to promote and the initial probation. (*Id.* at ¶10)

3. Insufficiency of the Evidence

In its final argument, defendant asserts that it was unreasonable for the jury to find for the plaintiff on the constructive discharge claim because the evidence is insufficient. In order to find for the plaintiff, the jury would have to find, and was instructed as such, that the sole motivating factor behind the defendant's adverse employment actions was plaintiff's gender.[8] (D.I. 157 at 18) The Court must review the record in the light most favorable to the nonmoving party. In doing so, the Court is willing to accept that the jury rejected the defense witnesses' claims that the investigation into plaintiff's "comping" activities was legitimate.

Having accepted that proposition, however, the Court is still left searching the record for evidence that gender played a determinative role in defendant's conduct. The Court has an obligation in this regard "to comb the record for any evidence or inferences that could support the jury's verdict." *Roebuck v. Drexel University*, 852 F.2d 715 (3d Cir. 1988). The Court has done so and has

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[8] The Court is aware that the United States Court of Appeals for the Third Circuit recently held that in ADEA pretext cases "district courts should instruct the jury that the plaintiff's burden is to prove that age played a role in the employer's decision making process and that it had a determinative effect on that process . . . it is not necessary for the plaintiff to prove that age was the sole cause of the employer's decision." *Miller v. Cigna Corp.*, No. 93-1773, 1994 WL 283269 (3d Cir. June 28, 1994) (emphasis added). However, this change in the law has no effect on the present analysis because the Court concludes that there is insufficient evidence to meet even this lesser burden of proof.

failed to locate sufficient evidence from which the jury could infer such a finding.[9]

A scrupulous review of the record finds the following as the only affirmative evidence that could be construed to support plaintiff's claim.[10] Plaintiff testified that on occasion Amblard would approach plaintiff when she was in the company of one of her male supervisors (e.g., Edd Barba or Nick Waller), and Amblard would not speak to her. (D.I. 150 at 41) Plaintiff also testified that Amblard personally told plaintiff that she would be watched like a "hawk" and a "dog." (*Id.*) Even if this Court were to accept these allegations as true, they would reflect only that Amblard treated plaintiff differently than others, not that he did so because she was a woman. Such a showing was found insufficient by the district court in *St. Mary's Honor Center v. Hicks*, 113 S.Ct 2742, 2748 (1993). In *Hicks*, the district court concluded that "although [respondent] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated." *Id.*

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[9] Notably, in plaintiff's answering brief to this motion she does not cite to any part of the record to prove this point. (D.I. 188)

[10] The Court cannot include in this list plaintiff's testimony that she complained to Amblard about not being promoted to Manager of Restaurants because she was a woman. The Court and jury have held that plaintiff suffered no adverse action because of that complaint. (D.I. 158 at 2; 172 at 6)

In addition to her testimony regarding Amblard, the only other evidence arguably relevant to plaintiff's constructive discharge claim are the inferences to be drawn from the fact that no woman has ever held the position of Manager of Restaurants (D.I. 153 at 136-37) and the fact that a man replaced her as Head Captain of the Green Room morning shift. The Court, however, finds this evidence to be insufficient as well. The record indicates that, at all relevant times, two of the remaining four Head Captain positions were filled by women and that women filled other equivalent positions at the Hotel. (See, e.g., D.I. 152 at 20, 42)

In reviewing the record for purposes of a Rule 50(b) motion, federal courts do not follow the rule that a scintilla of evidence is enough. "The question is not whether there is literally no evidence supporting the party against whom the motion is directed, but whether there is evidence upon which the jury could properly find a verdict for that party." *Walter v. Holiday Inns. Inc.*, 985 F.2d 1232, 1238 (3d Cir. 1993) (*quoting Indian Coffee Corp. v. Proctor & Gamble Co.*, 752 F.2d 891, 894 (3d Cir. 1985).

When faced with a similar situation the United States Court of Appeals for the Fifth Circuit held that, although the record was not totally devoid of evidence of age discrimination, the record "simply does not contain that 'just enough' modicum of evidence of age discrimination to supply that all important nexus between the plaintiff's age and his assumed constructive discharge." *Davis v. First National Bank of Killeen*, 976 F.2d 944, 950 (5th Cir. 1992). In *Davis* the plaintiff presented more evidence to support his claim than plaintiff at bar has done. For

example, he demonstrated that he was replaced by someone significantly younger than he, that he worked for two years under the new management without criticism, replacements throughout the company tended to be younger than their predecessors, and that he was asked to think about early retirement. *Id* at 949. Yet the court ruled that in light of the strong evidence in favor of a non-discriminatory motive, plaintiff presented "at most the proverbial scintilla but nothing more." *Id.* at 950.

Plaintiff has presented less evidence than the plaintiff in *Davis* and faces strong evidence from defendant that gender was not a motivating factor. Numerous witnesses involved in the decision-making process testified as to legitimate reasons why plaintiff was reassigned. (D.I. 162 at 14; 163 at 15-16; 164 at 10, 13-14; 167 at 62) In order to demonstrate that gender was a motivating factor, plaintiff would have to point to some evidence that that was the motive of those in the decision-making process. No such evidence exists in the record. Therefore, the Court shall grant defendant's motion for judgment as a matter of law because the evidence is not susceptible to a reasonable inference that gender was a determining factor in defendant's actions toward plaintiff.

The decision whether to grant a new trial is in the discretion of the trial court. *Bonjorno v. Kaiser Aluminum and Chemical Corp.*, 752 F.2d 802, 812 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986).

> The conditions which must be met to justify the grant of a new trial are not as stringent as those required for the entry of judgment as a matter of law. . . . A new trial cannot be granted, however, merely because the court would have weighed

> the evidence differently and reached a different conclusion. A court can only exercise its discretion to grant a new trial because the verdict was against the weight of the evidence when the failure to do so would result in injustice, or would shock the conscience of the court.

Markovich, 805 F.Supp. at 1235 (citations omitted). Defendant has moved alternatively for a new trial on all the grounds mentioned above. The Court shall enter judgment for the defendant in this matter, thus making this motion moot.[11]

4. Duty to Mitigate

Defendant also argues that it was unreasonable for the jury to conclude that plaintiff did not wholly fail to mitigate her damages. Given that the Court has granted defendant's motion, thereby setting aside the jury verdict for plaintiff that authorizes the jury to determine the mitigation of damages, defendant's motion is now moot.

B. Plaintiff's Motion for Judgment as a Matter of Law Or, In the Alternative, a New Trial

Plaintiff's motion for judgment as a matter of law is without merit. Plaintiff asserts that during his closing argument, defense counsel stated that he had been a

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[11] Fed.R.Civ.P. 50(c) requires this Court to make a conditional ruling on defendant's motion for a new trial should this Court's ruling be reversed. In such a case, the Court would grant the motion for a new trial because the jury's verdict is contrary to the weight of the evidence.

member of the Bar for thirty years, that he knew many of the witnesses at the DuPont Company, and that they were not lying. Plaintiff argues that this was improper and grounds for a mistrial. (D.I. 179 at 1-2) Defendant argues that counsel's statements were proper because he was merely responding to plaintiff's suggestion on cross examination of every defense witness that the witness was not telling the truth after meeting with the defense counsel. (D.I. 185 at 1)

As a threshold matter, the statements made during closing arguments were the following:

> And you would have to believe that the two lawyers, because no such conspirators could operate in the absence of the two lawyers who were working on the case, Mrs. Thompson and myself – I have been an officer of this Court for thirty years, and nobody in that time has ever made the slightest suggestion that I would be a party to anything like that. And I certainly wouldn't.

(D.I. 194 at 5) Contrary to plaintiff's assertion, the Court did in fact overrule plaintiff's objection.

The Court finds now, as it did then, that while the statements were dangerously close to vouching for the witnesses, given the nature of plaintiff's cross examination of the witnesses, they are not improper.

More fundamentally, however, plaintiff's motion suffers from a fatal flaw. The cases cited by plaintiff for the proposition that such comments are improper, also have an additional requirement: prejudice.

> While we agree, of course, that it is improper for counsel to comment on the credibility of witnesses from personal knowledge or from evidence not on the record, every such comment is not necessarily reversible error. **The question is whether improper comments caused sufficient prejudice to the complaining party**. . . .

Joseph v. Monroe, 419 A.2d 927, 930 (Del. 1980) (emphasis added); *see also Deangelis v. Harrison*, 628 A.2d 77, 80 (Del. 1993) ("To establish abuse of discretion, appellants must show that the improper comment was significantly prejudicial so as to deny them a fair trial."). Plaintiff makes the argument that defense counsel's statement had the effect of allowing the jury to believe Amblard and Maisel's testimony about mitigation of damages and the existence of other employment similar to the Head Captain position. Plaintiff offers no causal link whatsoever between this statement and the narrow issue of mitigation of damages allegedly affected. Therefore, plaintiff has failed to show prejudice and her motion shall be denied.

Just as with defendant's alternative motion for a new trial, plaintiff's motion for a new trial shall be denied. Even if this motion were not rendered moot by the Court's ruling concerning defendant's motion, the jury's decision to find that plaintiff failed to mitigate her damages is not against the weight of the evidence. In a two-year period the plaintiff's entire job search consisted of looking in the newspaper for a head captain job and mentally surveying hotels for a head captain job. (D.I. 153 at 149) Therefore, the fact that the jury concluded that plaintiff failed to mitigate her damages by an amount less than a two-year salary suggests that it allotted to plaintiff

some time in which she did not have to look for comparable employment, but not two years. As such the verdict is reasonable, and not against the weight of the evidence.

D. Defendant's Motion for Attorney's Fees

Section 2000e-5(k), Title 42 of the United States Code, provides for the award of attorney's fees to the prevailing party in an action under Title VII of the Civil Rights Act of 1991.[12] Defendant, if it is the prevailing party, is also entitled to attorney's fees, subject to certain limitations.

> [A] district court may, in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.

Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 421 (1978).

Defendant argues that plaintiff's suit was frivolous because 1) the claims against Amblard were dismissed because he was not an "employer" under Title VII; 2) plaintiff offered no proof that she was qualified for the position at issue; and 3) plaintiff offered no evidence of pretext. (D.I. 181 at 9-11) The United States Supreme Court has cautioned against the temptation of concluding

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[12] "In any action or proceeding under this title [42 U.S.C. §§2000e et seq.] the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission of the United States, a reasonable attorney's fee (including expert fees) as part of the costs. . . . " 42.U.S.C. §2000e-5(k).

that, because plaintiff did not ultimately prevail, her cause of action was unreasonable. *Id.* "Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Id.*

Such is the case at bar. With respect to plaintiff's claims against Amblard, plaintiff had numerous legal authorities to support her claim that Amblard, acting as her supervisor, may be liable as an employer. *See e.g., Moore v. Reese*, 61 F.E.P. Cases 1008, 1012 (D. Md. 1993); *Harvey v. Blake*, 913 F.2d 226 (5th Cir. 1990). While the Court, upon examining the case law, decided to favor the authority which supported no individual liability, the courts were split and it was reasonable for the plaintiff to litigate the issue.[13]

With respect to plaintiff's claim for failure to promote, that, too, was not frivolous or unreasonable. While the Court has held that plaintiff did not prove by a preponderance of the evidence that she was qualified for the position, the Court also found that it would not have been unreasonable for the fact finder to find that. (D.I. 108 at 13) Plaintiff put forward evidence suggesting that she was qualified, such as the fact that others with similar credentials were offered the position. (D.I. 193 at 231, 231) The fact that plaintiff did not put forward enough evidence to meet her burden does not make her claim frivolous.

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[13] Defendant's position that such an argument is frivolous is belied by the fact that it did not even object to the claims against Amblard until the Pretrial Order.

Defendant likewise claims that plaintiff put forward no evidence of pretext, thus making the claim frivolous. Plaintiff's argument on this point is persuasive. Plaintiff did put forward evidence impeaching, to a limited extent, some of the documents used for employment actions against plaintiff. Thus, there was a factual basis from which plaintiff could make her argument.

E. Plaintiff's Motion for Attorney Fees

Given the Court's ruling with respect to defendant's motion for judgment as a matter of law, plaintiff can no longer be considered a prevailing party under §2000e-5(k). *Hughes v. Repko*, 578 F.2d 483, 487 (3d Cir. 1978). Therefore, plaintiff no longer has a claim for attorney's fees and her motion is moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BARBARA R. SHERIDAN, Plaintiff, v. E.I. DuPONT de NEMOURS & COMPANY, INC., a Delaware corporation Defendant.	)	C.A. No. 93-46-SLR

ORDER

At Wilmington this 14th day of July, 1994, consistent with the memorandum opinion issued this date;

IT IS ORDERED that:

1. Plaintiff's motion for judgment as a matter of law or in the alternative for a new trial (D.I. 179) is denied.

2. Defendant's motion for judgment as a matter of law or in the alternative for a new trial (D.I. 182) is granted.

3. Plaintiff's motion for attorney's fees (D.I. 175) is denied.

4. Defendants' motion for attorneys' fees (D.I. 181) is denied.

5. Plaintiff's motion for an extension of time to file an appeal (D.I. 175) is denied as moot.

/s/ Sue L. Robinson
United States District Judge

CERTIFICATE OF SERVICE

I, Thomas Stephen Neuberger, being a member of the Bar of this court, do hereby certify that on November 28, 1994, I caused two (2) copies of this Brief and one (1) copy of the Appendix to be mailed first class, postage prepaid, to the following:

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E.I. DuPont DeNemours And Company
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THOMAS STEPHEN NEUBERGER, ESQUIRE

cc: Ms. Barbara R. Sheridan

Filed February 28, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-7509

BARBARA R. SHERIDAN,
Appellant

v.

E. I. DUPONT de NEMOURS AND
COMPANY; JACQUES AMBLARD

Present: SLOVITER, *Chief Judge*, BECKER, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN, *Circuit Judges*, and SCHWARZER,* *District Judge*

ORDER

A majority of the active judges having voted for rehearing in banc in the above appeal, it is

ORDERED that the Clerk of this Court vacate the panel's opinion and judgment dated January 31, 1996, and list the above case for rehearing in banc on May 14, 1996.

---

* Hon. William W. Schwarzer, Senior Judge, United States District Court for the Northern District of California, sitting by designation, as to panel rehearing only.

By the Court,

/s/ Dolores K. Sloviter
Chief Judge

Dated: *February 28, 1996*

A True Copy:
Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-7509

BARBARA R. SHERIDAN,

Appellant

v.

E.I. DUPONT DE NEMOURS AND COMPANY,
JACQUES AMBLARD

On Appeal from the United States District Court
for the District of Delaware
(D. C. Civil No. 93-cv-00046)

Argued May 4, 1995

Before: SLOVITER, *Chief Judge*, ALITO, *Circuit Judge*, and SCHWARZER, District Judge*

Reargued en banc May 14, 1996

Before: SLOVITER, *Chief Judge*, BECKER, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and SAROKIN**, *Circuit Judges*

---

* Hon. William W. Schwarzer, Senior United States District Judge, United States District Court for the Northern District of California, sitting by designation.

** Hon. H. Lee Sarokin heard argument but retired from office prior to the issuance of the opinion.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel on May 4, 1995 and reargued en banc May 14, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered July 15, 1994 entering judgment in DuPont's favor on the constructive discharge claim, be, and the same is hereby reversed and the cause is remanded to the District Court to reconsider DuPont's motion for a new trial. Costs taxed against appellees. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. Douglas Sigh
Clerk

Dated: November 14, 1996

Supreme Court, U.S.
FILED
MAR 5 1997
CLERK

No. 96-1231

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

E.I. DU PONT DE NEMOURS AND COMPANY,
Petitioner,
v.
BARBARA R. SHERIDAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

25 pp

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IN THE

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OCTOBER TERM, 1996

No. 96-1231

E.I. DU PONT DE NEMOURS AND COMPANY,
Petitioner,

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BARBARA R. SHERIDAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*. The written consent of all parties has been filed with the Clerk of this Court. The brief supports the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations, as well as several industry associations that, in turn, have hundreds of corporate members. EEAC's directors and officers include many of industry's foremost experts in the field of equal employ-

ment opportunity. Their combined experience gives EEAC valuable insight into the practical, as well as legal, issues surrounding the proper interpretation and application of fair employment laws and policies. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

EEAC's members, and the constituents of its association members, are all employers subject to Title VII of the Civil Rights Act of 1964, as well as other employment laws and regulations. As employers, and as potential respondents to employment discrimination claims, EEAC's members want to ensure their comprehension of and compliance with all applicable anti-discrimination laws.

Thus, the issues presented in the petition are extremely important to the nationwide employer constituency that EEAC represents. The Court of Appeals below held that once a plaintiff sets forth a prima facie case and introduces evidence that would allow disbelief of defendant's articulated non-discriminatory reasons, a jury is always permitted to draw an inference of intentional discrimination. Accordingly, a plaintiff may prevail without presenting any evidence of the ultimate issue of fact: whether the employer intentionally discriminated on the basis of a protected characteristic. This holding is contrary to this Court's decisions in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981) and *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, as well as to common sense. Allowing this decision to stand will undercut the rule of law and the burden of proof analysis established by the *McDonnell Douglas-Burdine-Hicks* trilogy and may prevent employers from making intelligent and informed employment decisions without fear of litigation in the future.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed briefs as *amicus*

curiae in a variety of cases before this Court, the United States Courts of Appeals, and various state supreme courts. As part of this *amicus* activity, EEAC has briefed a number of other cases before this court involving the standard of proof in intentional discrimination cases, including *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977); *Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *U.S. Postal Service Board of Governors v. Aikens,* 460 U.S. 711 (1983), and *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993).

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

This brief is timely as it is being filed within the time allowed in Supreme Court Rule 37.2 for filing a brief in support of the petition for a writ of certiorari.

STATEMENT OF THE CASE

The plaintiff filed a complaint against her former employer, the Hotel du Pont, pursuant to Title VII of the Civil Rights Act, 42 U.S.C. 2000e *et seq.* Specifically, plaintiff claimed that defendant had intentionally discriminated against her because of her gender by failing to promote her, retaliating against her for complaining about gender discrimination and, ultimately, by constructively discharging her.

Following a six day jury trial, the jury found for defendant on the issues of promotion and retaliation, but found for plaintiff on the constructive discharge claim and awarded her $17,500.00, in addition to back pay. Following post trial motions, the district court ruled for defend-

ant on the constructive discharge claim, stating that even if defendant's proffered reasons were false, plaintiff had failed to present any evidence that her gender played a role. (Pet. App. 125a).

On appeal, a panel of the Third Circuit reversed the district court, relying on the statement in *Hicks* that the "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination" and the Third Circuit's earlier precedent that " 'if the plaintiff has pointed to evidence sufficient[] to discredit the defendant's proffered reasons, to survive summary judgment the plaintiff need not also come forward with additional evidence of discrimination beyond his or her prima facie case.' " (Pet. App. 87a). On rehearing *en banc,* the entire Third Circuit, with one judge concurring in part and dissenting in part, likewise reversed the district court's judgment and remanded the case for a determination on defendant du Pont's motion for a new trial.

In so doing, the Third Circuit concluded that the Supreme Court's decision in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993), allows a plaintiff to "survive summary judgment (or in this case judgment as a matter of law) if the plaintiff produce[s] sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action." (Pet. App. 14a). It established a rule that disbelief in the employer's articulated reasons was sufficient to survive a motion for summary judgment or judgment as a matter of law, even without proof of intentional discrimination.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Since this Court issued its decision regarding the burdens of proof and sufficiency of the evidence in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993), all twelve

circuits have reviewed this Court's analysis and have applied it to employment discrimination cases. Unfortunately, despite the optimistic prediction of this Court that there would not be confusion among the circuits, there is a definite and distinct split revolving around one small, but apparently ambiguous word: the word "may" in this Court's statement that a factfinder's disbelief "may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Hicks,* 509 U.S. at 511.

Does "may" mean that a factfinder is completely free to find discrimination, even in the absence of proof of the ultimate issue, as the Third Circuit concluded? Or, as *amicus curiae* and several other circuits submit is the proper definition, does "may" mean that in some instances a prima facie case in addition to the evidence of pretext submitted by a plaintiff is sufficient to permit a finding of discrimination without requirement of additional proof? In short, does the word "may" mean "always can" or "sometimes not?"

The division in the circuits creates confusion for employers and employees alike. Can a plaintiff survive a motion for summary judgment in the First Circuit merely by contending that employer's reason is unbelievable? Is summary judgment completely unavailable to employers in the Ninth Circuit, once a plaintiff says the employer's reason is false? If, as the Court of Appeals contends, once the plaintiff presents evidence sufficient to create disbelief in employer's articulated reason, the jury may always find discrimination, what role does the trial court play? By equating disbelief or pretext with a finding of discrimination, the Court of Appeals nullifies the experience and discretion of the trial court and forecloses employers from utilizing motions for summary judgment or judgment as a matter of law as artillery in their defense. Because the circuits continue to grapple with these recur-

ring issues, and reach conflicting results, both between and among themselves, this Court should grant the writ to define its terms and provide needed clarification.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION, WHICH ALLOWS A PLAINTIFF TO SURVIVE A MOTION FOR SUMMARY JUDGMENT OR FOR JUDGMENT AS A MATTER OF LAW MERELY BY QUESTIONING THE EMPLOYER'S ARTICULATED BUSINESS REASON WITHOUT PROVING THAT THE REAL REASON WAS A "PRETEXT FOR" DISCRIMINATION, CONFLICTS DIRECTLY WITH DECISIONS OF THE FIRST, FIFTH AND EIGHTH CIRCUITS

A. The Main Issue of Discordance Among the Circuits and the Conflict the Third Circuit Has With *Hicks* Is Based Upon the Definition of the Word "May" As It Pertains to the Sufficiency of the Evidence

While all of the circuits have engaged in mental gymnastics to apply this Court's decision in *Hicks,* the nub of the problem falls to one small word within one oft-cited passage: "may."

In concurring in the denial of rehearing *en banc* in *Barbour v. Merrill,* 48 F.3d 1270 (D.C. Cir. 1995), *cert. dismissed,* 116 S.Ct. 1037 (1996), Judge Williams of the District of Columbia Circuit, joined by Judges Silberman and Ginsburg, identified the problem the circuits are having:

> I do not construe the panel opinion to read *St. Mary's Honor Ctr. v. Hicks,* —— U.S. ——, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), as saying that every factfinder is free to find discrimination *in every case* where the plaintiff has established a prima facie case and offered evidence sufficient to disprove the defendant's attempted rebuttal. The Court wrote:
>
> > "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of men-

> dacity) *may*, together with the elements of the prima facie case, suffice to show discrimination."
>
> *Id.*, at —, 113 S.Ct. at 2749 (emphasis added). The word "may" is ambiguous. It might mean that the factfinder is completely free to find discrimination, in the sense that an appellate court could never reverse such a decision on the evidence. Alternatively, it might mean that in some cases the combination will be adequate to sustain a finding of discrimination, in others not, to be determined by a factfinder initially, and the appellate court on review, according to the usual principles.

Barbour, 48 F.3d at 1281. Regrettably, the Third Circuit has seized upon the ambiguity observed by Judge Williams and has interpreted it so as to abdicate the court's function of ruling on the sufficiency of the evidence. It is this ambiguity that this Court must address.

B. A Decisive Split Between the Circuits Continues, As Each Circuit Grapples With This Court's Decision in *Hicks*

All of the circuits have decided the issue regarding the sufficiency of the evidence a plaintiff must present to avoid a motion for summary judgment or judgment as a matter of law in light of this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Despite this Court's sanguine prediction that no confusion should result from its decision in *Hicks*, the courts of appeals have failed to comprehend consistently this Court's instruction on the burden and sufficiency of evidence in employment cases.

The decision by the Third Circuit directly conflicts with decisions in three other circuits, the First, Fifth and Eighth, as well as various panels within the Second and Fourth Circuits.[1] Moreover, while a number of other

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[1] *Woods v. Friction Materials*, 30 F.3d 255, 260 (1st Cir. 1994) ("[P]laintiff must produce sufficient evidence, direct or indirect, to show that the reasons advanced by the employer constitute a

circuits have decided, as the Third Circuit did here, that pretext alone is sufficient to avoid summary judgment or judgment as a matter of law,[2] they too have expressed

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mere pretext for unlawful discrimination."); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (*en banc*); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996) ([P]laintiff can avoid summary judgment only if the evidence considered in its entirety (1) creates a fact issue as to whether the employer's proffered reasons are pretextual and (2) creates a reasonable inference that age was a determinative factor in the adverse employment decision."); *See also, Fisher v. Vassar College*, 70 F.3d 1420, 1437 (2d Cir. 1995) ("[T]he finding of pretext here did not alone justify a finding of discrimination."); *Jiminez v. Mary Washington College*, 57 F.3d 369 (4th Cir.), cert. denied, 116 S.Ct. 380 (1995) ("[R]ejection of the defendant's proffered reason—standing alone—does not compel the ultimate conclusion that the defendant unlawfully discriminated against the plaintiff . . . .").

[2] *See Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) ("[P]laintiff need only establish a prima facie case and introduces evidence sufficient to discredit plaintiff's proffered nondiscriminatory reasons;"); *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) ("*Hicks* clarified that the only effect of the employer's non-discriminatory explanation is to convert the inference of discrimination based upon the plaintiff's prima facie case from a mandatory one . . . to a permissive one. . . ."); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994) ("[F]or summary judgment purposes, the non-moving party, in this case the plaintiff, has a lesser burden. He must only 'produce evidence from which a rational factfinder could infer that the company lied.'"); *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993) ("Because, as *St. Mary's* recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more, there will always be a questions for the factfinder once a plaintiff establishes a prima facie case and raises a genuine issue as to whether the employer's explanation for its action is true."); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995) ("Consequently, because a jury may find illegal discrimination upon nothing more than a prima facie case and pretext, such a showing at the summary judgment stage is sufficient to get the case to the jury.") (footnote omitted); *Combs v. Meadowcraft, Inc.*, No. 95-6922, 1997 U.S. App. LEXIS 3028 (11th Cir. Feb. 20, 1997).

some internal misgivings.[3] Because there is such confusion on this issue, it is ripe for this Court to review. While some issues may benefit from additional "seasoning" within the various circuits until all of them conclude decisively, this is an issue of semantics that requires the attention of this Court. While this Court's "dissection of the sentences of United States Reports" is not the most desirable of duties, the circuits' failure to discern this Court's meaning is grossly apparent and in need of immediate resolution. *Hicks,* 509 U.S. at 515.

II. THE THIRD CIRCUIT MISAPPREHENDED THE DECISION IN *HICKS* BY FOCUSING ON THE EVIDENCE OF PRETEXT RATHER THAN THE ULTIMATE ISSUE OF DISCRIMINATORY CONDUCT

A. While Several Circuits Have Found That Evidence of Pretext or Disbelief May Help a Plaintiff To Avoid a Motion for Summary Judgment or To Survive a Motion for Judgment As a Matter of Law, These Circuits Have Properly Held That Plaintiff Must Adduce Evidence That the Employer's Reasons Were a Pretext for Discrimination

Can the plaintiff's prima facie case plus evidence of a pretext be sufficient to allow a plaintiff to get to a jury, or must a plaintiff adduce additional evidence beyond the prima facie case and evidence of a pretext? The answer to both questions, under a proper construction of *Hicks* is yes, *in some cases.*

> [T]he Supreme Court envisioned that some cases exist where a prima facie case and the disbelief of a pretext *could* provide a strong enough inference of actual discrimination to permit the fact-finder to find for the plaintiff. Conversely, we do not think that

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[3] *Emmel v. Coca-Cola Botting Company,* 95 F.3d 627, 634, n.3 (7th Cir. 1996) (citations omitted) ("While we permit this inference [jury's prerogative to disbelieve uncontradicted testimony], we note that the argument that a jury might not believe the proffered legitimate business reason is not enough to defeat summary judgment.")

> the Supreme Court meant to say that such a finding would always be permissible . . . . The strength of the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances. In short, everything depends on the individual facts.

Woods v. Friction Materials, 30 F.3d 255, 261 n.3 (1st Cir. 1994) (emphasis in original). It is this factually specific examination which the Third Circuit seeks to avoid, and it is its unwillingness to have courts engage in case by case factual analysis which this Court must now address.

While this Court recognized that, in certain cases, the prima facie case in conjunction with the evidence of pretext is sufficient to permit the trier of fact to infer the ultimate fact of discrimination, it also recognized that such evidence "may not" always be sufficient. The plaintiff must provide evidence that will "suffice to show intentional discrimination." Only where the plaintiff has set forth prima facie evidence in conjunction with evidence of employer's pretext, which when considered together may allow a reasonable jury to conclude that employer has intentionally discriminated against the employee, will "no additional proof be required." *Hicks,* 509 U.S. at 511. Indeed, a plaintiff's evidence of pretext might perform "double duty" by "serv[ing] the additional purpose of permitting an inference that [unlawful] discrimination was a motivating factor in a plaintiff's termination." *Kehoe v. Anheuser-Busch, Inc.,* 96 F.3d 1095, 1102 (8th Cir. 1996) (*citing Nelson v. Boatmen's Bancshares,* 26 F.3d 796, 800, 801 (8th Cir. 1994). Whether the plaintiff has presented such evidence is a factually specific determination which must be decided on a case by case basis.

In a recent *en banc* decision, the Fifth Circuit considered the "sufficiency of the evidence" question in light of this Court's holding in *Hicks* and properly required the plaintiff to adduce some evidence that the employer's articulated reasons were a pretext for discrimination in

order to get to the jury and to have a jury verdict upheld. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*). In *Rhodes*, a jury had found for plaintiff on his age discrimination case. Guiberson Oil appealed the judgment on grounds of insufficient evidence. A split panel of the Fifth Circuit reversed the judgment and found for Guiberson Oil. The Fifth Circuit reheard the case *en banc* "to consider the sufficiency question in light of the Supreme Court's recent decision in *St. Mary's Honor Center v. Hicks*, —— U.S. ——, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)." *Rhodes*, 75 F.3d at 992.

In reviewing the entire record and recognizing generally plaintiffs' need for and reliance upon circumstantial evidence and inferences in most employment discrimination cases, the Fifth Circuit made the following determination:

> [A] plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which employee complains. The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory.

Rhodes, 75 F.3d at 994.

Similarly, the Eighth Circuit (from which *Hicks* came), also requires plaintiff to create an issue of fact as to whether employer's proffered reasons are pretextual and to create an inference that the protected characteristic was a determinative factor. This view acknowledges the middle ground forged by this Court when it stated in *Hicks* that the factfinder's disbelief of the employer's explanation may, together with the prima facie case, suffice to show intentional discrimination. It is also consistent with the notion that the burden of persuasion as to the ultimate issue of intentional discrimination remains with the plaintiff at all times and that this burden is not necessarily

satisfied merely by discrediting the employer's explanation. *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996). "The focus, however, always remains on the ultimate question of law: whether the evidence is sufficient to create a genuine issue of fact as to whether the employer intentionally discriminated against plaintiff." *Id.*

B. By Focusing on the Evidence of Pretext Rather Than the Ultimate Issue of Discriminatory Conduct, the Third Circuit Misapplied *Hicks* and Revived the "Pretext Only" Rubric for Plaintiffs Seeking To Avoid Summary Judgment or Judgment As a Matter of Law

The Third Circuit concluded that evidence sufficient to discredit an employer's articulated reason will always suffice to withstand an attack by an employer on the sufficiency of the evidence, either by summary judgment motion or motion for judgment as a matter of law. The Third Circuit misstated this Court's decision in *Hicks* and construed it precisely as Judge Williams of the D.C. Circuit chose not to, holding that whenever a jury can disbelieve an employer's reason for its action, then the evidence is, *a priori*, sufficient to support a finding of discrimination.

> In granting judgment as a matter of law for DuPont, the district court stated that "plaintiff would have to point to some evidence" that gender was the motive of those in the decisionmaking process. It is evident that the district court believed that something more was required than was set forth in *Hicks* and our cases. Not only was such a requirement of additional evidence rejected in *Fuentes* where we stated that "if the plaintiff has pointed to evidence sufficiently to discredit the defendant's proffered reasons, to survive summary judgment the plaintiff need not come forward with additional evidence of discrimination beyond his or her prima facie case." 32 F.3d at 764, but it is also inconsistent with the state-

> ment in *Hicks* that upon rejection of defendants' proffered reasons for the action, "no additional proof of discrimination is required." 509 U.S. 511, 113 S.Ct. at 2749 (internal quotations omitted).

(Pet. App. at 24a). *Hicks* does not and cannot support the Third Circuit's conclusion.

> We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated.* . . . But nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's action was not believable.

Hicks, at 514 (emphasis in original).

In *Hicks,* this Court sought to resolve a circuit split regarding the proof an employee had to set forth to prevail in a Title VII discrimination claims. Prior to *Hicks,* there were two general schools of thought: "pretext-only" and "pretext-plus." Simply stated, in "pretext-only" circuits, "[o]nce a plaintiff proved all of defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law." *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 492 (8th Cir. 1992). "Pretext-plus" circuits required more than a showing of falsity of employer's proffer. They needed proof of discriminatory animus. *Bienkowski v. American Airlines,* 851 F.2d 1503, 1508, n.6 (5th Cir. 1988) ("There must be some proof that [age] motivated the employer's action, otherwise the law has been converted from one preventing discrimination because of [age] to one ensuring dismissals only for "just cause" to all people over 40.").

In resolving this burden of proof conflict, this Court reviewed its earlier decisions and found that once an employer succeeds in asserting its nondiscriminatory rea-

sons, the presumption created by the prima facie proof drops from the case and "the factual inquiry proceeds to a new level of specificity." *Hicks*, 509 U.S. at 515-517, *citing Burdine*, 450 U.S. at 253. The trier of fact then proceeds to the ultimate issue: whether the employee has proven that the employer intentionally discriminated against her because of her gender. This Court specifically rejected the "pretext only" school of thought by explaining that disbelief of the employer's reasons does not compel judgment for plaintiff. Rather, once the employer has articulated its non-discriminatory reason, "the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Hicks*, 509 U.S. at 515-17, *citing Burdine*, 450 U.S. at 253.

In a rigorous discourse on the issue of pretext, this Court pointed out the fallacy of the argument *that because the stated reason was false, then the true reason must be discriminatory* and concluded that "A reason cannot be proved to be 'a pretext for *discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Hicks*, 509 U.S. at 515-517. In its decision below, however, the Third Circuit ignored this explicit conclusion and, in likening pretext to flight from crime, presumed its own:

> If the employer fails to come forth with the true and credible explanation and instead keeps a hidden agenda, it does so at its own peril. Under those circumstances, there is no policy to be served by refusing to permit the jury to infer that the real motivation is the one that the plaintiff has charged.

(Pet. App. at 21a).

III. BY MAKING EVIDENCE OF PRETEXT OR DISBELIEF OF AN EMPLOYER'S ARTICULATED REASON AN "AUTOMATIC BYE," GUARANTEEING A TRIAL BY JURY, THE COURT OF APPEALS EVISCERATED RULES 50 AND 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE, NULLIFIED THE GATEKEEPING FUNCTION OF THE TRIAL COURT, AND ABDICATED ITS OWN RESPONSIBILITY TO ENSURE THAT JUDGMENTS ARE BASED ON LEGALLY SUFFICIENT EVIDENCE

A. The Decision of the Third Circuit Eviscerates Rules 56 and 50 of the Federal Rules of Civil Procedure by Elevating the Issue of Employer's Articulated Reasons to the Ultimate Issue of Fact

Once a plaintiff presents some evidence by which the employer's articulated reason might be disbelieved, can an employer avail itself of a motion for summary judgment or motion for judgment as a matter of law? More importantly, may the trial court, in its discretion and experience, enter judgment for employer as a matter of law, once plaintiff adduces such evidence? The answer to both, according to the Third Circuit, is no. In its decision, the Third Circuit concluded that evidence of pretext or disbelief of employer's reasons is always sufficient for a plaintiff's case to proceed to trial and to survive any post-trial attacks or appeals by employers.

By elevating the correctness or believability of the employer's articulated reason to the ultimate issue to be tried by the jury, the Third Circuit precludes a trial court from ruling whether the evidence is sufficient to support a finding of discrimination and allows all claims to proceed to a jury determination and to be upheld post trial and on appeal. The ultimate issue becomes the correctness of employer's reason, not discrimination *vel non*. Thus, in contravention of *Hicks* and other circuits which follow its teaching, the Third Circuit effectively eliminates two Federal Rules of Civil Procedure and usurps the power of the courts by preventing them from granting a motion

for summary judgment under Rule 56 or a motion for judgment as a matter of law, pursuant to Rule 50. *See* Federal Rules of Civil Procedure, 56 and 50.

Typically, in an employment discrimination case, a court must focus on whether "a genuine issue exists as to whether the defendant intentionally discriminated against the plaintiff." *Grimes v. Texas Dep't of Mental Health*, 102 F.3d 137, 139 (5th Cir. 1996). By focusing on the "correctness" of employer's articulated reason and making that the preeminent issue of material fact, the Third Circuit has changed the whole tenor of burden of proof and sufficiency of evidence despite this Court's ruling in *Hicks*.

> [O]nce the defendant has responded to the plaintiff's prima facie case, "the district court has before it all the evidence it needs to decide" *not* (as the dissent would have it) whether defendant's response is credible, but "whether the defendant intentionally discriminated against the plaintiff."

Hicks, 509 U.S. at 519, *citing Aikens*, 460 U.S. 711, 715 (internal quotation marks omitted by Supreme Court).

Rather than authorizing this dismantling of Rules 56 and 50, this Court emphasized that trial courts and courts sitting in review should not treat discrimination cases any differently, either in factual determinations or in allocation of burdens and orders of proof. *Hicks*, 509 U.S. at 523-25. The trial court still has the power to determine whether the ultimate issue of discrimination has been proven and to rule on the evidence as a matter of law.

> [T]o survive [employer's] summary judgment motion, [employee] had to adduce sufficient evidence to support a finding that [employer's] stated reason was not only a pretext, but that it was a pretext for illegal sex discrimination.
>
> * * * *
>
> Even if we assume *arguendo* that this evidence is sufficient to support a finding of pretext, it could not, standing alone, possibly lead a reasonable jury to conclude that discriminatory animus was the real

> motivation behind [employer's] action. Title VII does not grant relief to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless the facts and circumstances indicate that discriminatory animus was the reason for the decision.

Smith v. Stratus Computer, 40 F.3d 11, 16 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1958 (1995) (citation omitted). To hold otherwise, as the Court of Appeals did, would give the jury, as factfinder, unfettered discretion whenever evidence of disbelief has been adduced. Clearly, this is not the holding of *Hicks*, and the Third Circuit's error is even more apparent when the procedural context of *Hicks* is considered. In reversing the Eighth Circuit in *Hicks*, this Court did not order the Eighth Circuit to affirm the district court's findings, as it would have done if the factfinder always has the last word in evaluating pretext evidence. Instead this Court simply remanded, explaining:

> Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of (in the context of present case) race. That the employers' proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review—which should be conducted on remand in this case under the "clearly erroneous standard of Federal Rule of Civil Procedure 52(a). . . ."

Hicks, 509 U.S. at 523-525.

The issue whether the employer is motivated by discrimination is reviewable like any other question of fact. After a bench trial, a trial court's finding of pretext-for-discrimination is reviewable for clear error.[4] After a

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[4] Upon remand the District Court in *Hicks* entered judgment for employer, St. Mary's Honor Center. The Eighth Circuit, in reviewing for clear error the District Court's finding of no racial dis-

jury trial, the jury's general verdict is reviewable under the standard for granting judgment as a matter of law. And before trial, the issue may be considered under the well-known standard that governs motions for summary judgment. *See Rothmeier*, 85 F.3d at 1335, n.9. As this Court has repeated time and again, trial courts and reviewing courts should not "treat discrimination differently from other questions of fact." *Hicks*, 509 U.S. at 524 (quoting *Aikens*, 460 U.S. at 716). That is precisely what the Third Circuit has done.

B. The Decision Below Prevents the Trial Courts From Performing Their Duty of Winnowing the "Chaff From the Wheat" To Ensure That Meritorious Claims Are Adjudicated While Unsubstantiated Trivial Ones Are Not

The Third Circuit would have every plaintiff who can meet the simple burden of a prima facie case and who can merely question the "rightness" of employer's reason for any employment action be entitled to a trial by jury. The "threshold inquiry" set forth by the Third Circuit prevents trial judges from exercising their authority to determine whether the evidence presented is sufficient to allow a meritorious litigant to have his day in court. This threshold inquiry prevents the trial court from dismissing any unsubstantiated claims which may congest the system, so as to prevent deserving plaintiffs from having their day in court. This decision harms, in particular, those individuals the civil rights acts were created to protect, while sheltering from the scrutiny of the trial court those disingenuous litigants who abuse the system and violate the law.

The Civil Rights Act of 1991 made money damages available to plaintiffs and thus, created additional incentives for individuals to file suit. Since its passage, the number of employment discrimination suits filed annually has increased almost threefold from 8,140 in 1991 to

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crimination, affirmed the lower court's decision. *Hicks v. St. Mary's Honor Center*, 90 F.3d 285 (8th Cir. 1996).

23,152, for the twelve month period ending September 30, 1996. *See* Administrative Office of the United States Courts, Reports of the Proceedings of the Judicial Conference of the United States (1991, 1996). Thus, while these various individuals may be seeking vindication of their rights in the workplace, the deluge of discrimination suits suggests that opportunism plays a role.

Who loses under the decision of the Third Circuit and who stands to gain? Under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(5), Congress stated "that it shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited." The Third Circuit's decision effectively takes that priority away from those it was created to protect, by permitting evidence of pretext or the questioning of the employer's action always to survive a motion for summary judgment. Thus, meritorious plaintiffs will have to wait in line with others who may simply be taking their chances for the pot of gold. Similarly, this decision prevents innocent employers from defending themselves without paying the high cost of trial or potentially paying "nuisance value" to meritless cases, so as to avoid the cost. On the other hand, the guilty may take comfort in the knowledge that justice will be delayed.

Allowing the barrage of employee cases to go to the jury will lessen the impact of each individual case, as the watered-down claims are mixed with meritorious ones. Thus, plaintiffs who may be entitled to a fair and prompt adjudication of their rights may become invisible to a jury because of the glut of cases the Third Circuit and others would permit to proceed to trial.

Trial courts are uniquely qualified to determine whether claims made by plaintiffs present evidence sufficient to create a reasonable inference of discriminatory intent in order to defeat summary judgment. *Grimes*, 102 F.3d at 141. When the Court of Appeals suggests that a plaintiff automatically goes to a jury once he presents "threshold evidence" of disbelief of employer's proffered reasons,

it instructs the trial courts that they no longer should follow a traditional sufficiency of the evidence analysis. The Court of Appeals removes the trial court's discretion to decide that no reasonable jury viewing the evidence as a whole would find that an employer took an action because of discrimination.

CONCLUSION

Because the Court of Appeals contends that disbelief or pretext in conjunction with a prima facie case is sufficient to survive a motion for judgment, the decision of the jury, even without plaintiff proving discrimination, is final. This problem is exacerbated because unlike a bench trial, juries do not have to make findings of fact and conclusions of law. Thus, upon review of a jury verdict, a trial court cannot grant a motion for judgment as a matter of law, if there is evidence of pretext, disbelief or possibly mere disagreement. Because the trial court cannot query the jury about its determination to verify some finding of discrimination, pretext alone remains a mandatory "win" for plaintiff. This Court specifically rejected this approach in *Hicks* and must do so again. Mere pretext or disbelief cannot suffice in all cases to support a finding of discrimination.

For all of the foregoing reasons, EEAC respectfully requests that the Court grant certiorari in this case.

Respectfully submitted,

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March 5, 1997

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FILED
APR 11 1997
OFFICE OF THE CLERK

No. 96-1231

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

E.I. DU PONT DE NEMOURS AND COMPANY,

Petitioner,

v.

BARBARA R. SHERIDAN,

Respondent,

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent, Barbara R. Sheridan, filed a complaint alleging intentional gender discrimination on the part of E.I. DuPont De Nemours and Company and Jacques Amblard in promotion, retaliation and constructive discharge. On each of these three counts, she proceeded on a pretext theory claiming that any legitimate non-discriminatory reason offered was unworthy of credence. She claimed that the key players in this dispute, Amblard and employees Dougherty and Maisel, were lying to cover up Amblard's intentional gender discrimination.

The promotion claim stemmed from a failure to promote or even consider promoting Barbara to be manager of restaurants at the Hotel DuPont, a four star restaurant in Wilmington, Delaware. The retaliation claim arose from challenged disciplinary actions and the fact that Respondent was placed on probation after she complained to Amblard about his failure to promote her based upon her gender. The constructive discharge claim arose four months after Barbara had complained to Amblard about not being promoted due to her gender when, on February 26, 1992, she was accused of the crime of stealing. Her accusers based this spurious claim on a written dated listing allegedly provided by a male bartender, Mr. Dougherty, who eventually replaced Respondent. However, Barbara was on jury duty on five of the dates listed, and her immediate supervisor, Mr. Maisel, in his own handwriting admitted that another head captain was scheduled to work Respondent's shift on seven different dates at issue. Respondent then was offered three demeaning jobs after Amblard and other supervisors conducted a public investigation into her alleged stealing activities. Given these facts, Respondent's only logical course of action was to resign and file a lawsuit to clear her name.

From April 26 until May 3, 1994, a six day trial took place, involving 24 different witnesses. After deliberations the jury returned special interrogatories and found that Barbara was constructively discharged *solely* because of gender. Petitioner then moved for judgment as a matter of law and a new trial and began to advance the argument that the *Hicks* doctrine was a dramatic and hurtful change in the law for employers and that something more than the prima facie case coupled with evidence of mendacity and pretext was necessary to prove intentional discrimination. The district court agreed and disregarded the jury's verdict in a mendacity case and entered judgment in favor of DuPont and Amblard as a matter of law, and also granted a new trial in the alternative.

A Third Circuit panel disagreed that *Hicks* was dramatically adverse to employers and ruled for Respondent. That Court then also ruled en banc for Respondent by a 10 - 1 vote and held that -

> [W]e have understood *Hicks* to hold that the elements of the prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination.

App. 13a, *Sheridan v. E.I. DuPont De Nemours & Co.,* 100 F.3d 1061, 1066-67 (3d Cir. 1966)(en banc). But Petitioner herein has continued to advance the argument that in order to protect employers something more than this is needed in the paradigm for intentional discrimination in a pretext case.

SUMMARY OF ARGUMENT

Petitioner has constructed its argument that a split in the Circuits exists by relying upon dicta from First and Fifth Circuit cases, which are just that -- dicta. But if the cases are analyzed there are no circuit holdings contrary to the rule of

law carefully articulated in *Sheridan*. The Eleventh Circuit recently addressed this question in detail and it agrees that all the Circuits are appropriately interpreting *Hicks* and that they are not applying any hurtful statement of the law to employers. *Combs v. Plantation Patterns,* 106 F.3d 1519, 1534-38 (11th Cir., 1997), petition for rehearing en banc pending. Thus, it is premature to grant certiorari since the clear trend is for the courts of appeals to read *Hicks* correctly. At least until there is a contrary holding from another circuit, the Court should not grant certiorari.

ARGUMENT

I. THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT IN THE CIRCUITS AND "HICKS" IS BEING PROPERLY APPLIED.

This case was correctly decided by the en banc Third Circuit applying the proper legal principles. This was a hotly contested pretext case that was ultimately decided on credibility and the jury's determination of which version of the events to believe. Respondent coupled her prima facie case with evidence of pretext which permitted the jury to infer intentional gender discrimination because its disbelief was coupled with strong evidence of mendacity. On a direct challenge to this paradigm for proving discrimination the Third Circuit correctly applied this Court's precedents for circumstantially proving discrimination. Petitioner's present argument also is based upon a straw man. The Third Circuit did not hold that evidence of pretext automatically entitles a party to a verdict but that evidence of pretext, coupled with the elements of the prima facie case, will permit a jury to infer discriminatory intent, particularly if there is evidence of mendacity.

Factually, after the jury verdict below the evidence has to be considered in the light most favorable to the prevailing party, assuming that all conflicts of the evidence were resolved in favor of the Respondent, assuming as proven all

facts that the prevailing party's evidence tended to prove, and giving the prevailing party the benefit of all favorable inferences that may reasonably be drawn from the facts proven. Viewed in this light, Respondent was a capable, ambitious employee who was being held down by her supervisor. But for one year that supervisor was removed and a division of DuPont ran her Hotel. Respondent then received the recognition she deserved, numerous raises, promotions, a bonus and other acknowledgements. But in the second quarter of 1991, that division moved on and Amblard, her former supervisor, again assumed responsibility. Non-recognition of Barbara's achievements returned. Respondent came back from vacation and then learned that five males and no females had been considered for a non-posted promotion. She said that was enough and complained of gender discrimination. That supervisor then peppered the file with false postdated documents to drive her out because of her complaints of his gender discrimination.

This then became a "pretext" case, replete with mendacity, where the jury's determination of credibility was crucial. Respondent attacked numerous contradictions, inconsistencies and weaknesses in the employer's non-discriminatory reasons to show that they were unworthy of belief and she coupled this with her prima facie case to permit the jury to infer intentional discrimination if it was convinced that the evidence of mendacity in the record was sufficient to show intentional discrimination.

The jury was offered evidence of pretext in almost 20 categories, including:

(1) The proverbial smoking gun, which included a written list of allegedly stolen drinks by date which was disproved since Respondent was either serving on jury duty in State Court or was scheduled off on those dates. The male author of

that document was rewarded for its fabrication and replaced Respondent in her job. 7, 31-33a.

(2) Her supervisor's written contention, in a falsified document, that Respondent had attended a meeting on a date certain was contradicted by his own handwritten work schedule which showed that the other document was fabricated since she was not working on that day. 7, 33a.

(3) Claims that staff complained about Respondent were contradicted by another supervisor's truthful admission that the staff did not complain about her. 76a.

(4) Numerous witnesses were impeached by prior inconsistent sworn testimony. 33-34a.

(5) Oral testimony was impeached by prior written documentation. 31-33a.

To use an analogy, to enable the jury to understand the play on the basis of its entire performance, and not just upon certain scenes alone, evidence of pretext was coupled with the prima facie case and other gender related evidence to indicate that gender was a motivating factor in the decision. The overall scenario indicated that:

(1) Respondent was replaced by a male who had fabricated the stealing charges against her. 8, 127a.

(2) Five males and no females were considered for the unposted promotion at issue. 32a.

(3) The number of female head captains decreased while the number of male head captains increased. 8, 28a.

(4) Three times in September and October, Respondent complained directly to Amblard about his treatment of her due to her gender. When faced

with these accusations he refused to deny them and instead an investigation of her began. 32a, 77a.

(5) Finally, in the presence of other male supervision Amblard would not speak to Respondent, a female. 8, 33a.

In light of this and other evidence, the Third Circuit articulated and applied the appropriate legal principle, set out verbatim at page 2 above, which permits the jury, if it finds sufficient evidence of mendacity, coupled with the prima facie case, permissively to draw an inference leading it to conclude that there was intentional discrimination. To quote this Court's ruling in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993),

> the trier of fact proceed[ed] to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [the plaintiff]". The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required."

Id. at 511 (citations omitted). That ruling was correctly articulated and applied herein.

In further clarification of the analysis necessary to prove discrimination circumstantially, and in order to resolve a split in authority among the federal circuits, the Court in

Hicks considered "whether, in a suit against an employer alleging intentional racial discrimination in violation of [Title VII], the trier of fact's rejection of the employer's asserted reasons for its actions *mandates* a finding for the plaintiff." *Id.* at 504. The Court held that a factfinder need not rule for the plaintiff, even though it disbelieves the reasons offered by the defendant, if the plaintiff has not established that race or some other protected classification was what motivated the employer's action. *Id.* at 518-19. The Court resolved that at trial the plaintiff in a discrimination case must "convince the factfinder *both* that the [employer's proffered] reason was false, and that discrimination was the real reason" for the decision about which the plaintiff complains. *Id.* at 515. While noting that rejection of the defendant's proffered reasons does not compel judgment for the plaintiff, the Court held that evidence of disbelief together with the earlier evidence presented to establish the prima facie case can carry the plaintiff's burden, particularly if accompanied by the suspicion of mendacity. *Id.* at 511. "The defendant's `production' (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven `that the defendant intentionally discriminated against [him]'..." *Id.* at 511. "Even though...rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, there must be a finding of discrimination." *Id.*

Accordingly, as the Third Circuit correctly explained, the holding in *Hicks* is that a plaintiff is not entitled to judgment as a matter of law simply because she proves her prima facie case and shows that the employer's proffered reasons for the adverse action are false. But she may prevail under such circumstances through submission of her case to the ultimate factfinder. Contrary to Petitioner's argument, a plaintiff need not produce additional evidence of discrimination beyond her prima facie case and evidence of pretext in order to prove intentional discrimination. *Id.* That, of course, was the holding

of the Third Circuit which it correctly applied to the present case. 13a, 100 F.3d at 1066-67.

Petitioner's contention that the circuits are split is simply erroneous and the Third Circuit correctly analyzed the case law in this regard. 15-17a. The argument over a split in the circuits is just a straw man. The Third Circuit did not hold that evidence of pretext *automatically* entitles a plaintiff to a jury verdict but only that evidence of pretext, coupled with the elements of the prima facie case permits a jury to infer discriminatory animus, especially if joined with evidence of mendacity. Moreover, since the *Sheridan* decision the Eighth Circuit en banc also has followed *Sheridan*'s statement of the law which is quoted at page 2 above. *Ryther v. KARE 11,* 1997 WL 94025 *4 (8th Cir., March 6, 1997)(en banc), cert. petition filed *KARE 11 v. Ryther*, No. 96-1571, April 4, 1997.

Aside from its straw man claim that a verdict is "automatic," Petitioner has constructed its argument that a split exists by relying upon dicta from First and Fifth Circuit cases, which are just that -- dicta. But if the cases are carefully analyzed there are no circuit holdings contrary to the rule of law articulated in *Sheridan*. The Eleventh Circuit fully addressed this question in detail recently. It agreed that nine Circuits are appropriately applying *Hicks* and that no Circuit has made any dramatic or hurtful mis-statement of the law with regard to employers. *Combs v. Plantation Patterns,* 106 F.3d at 1534-38. Only dicta in the First and Fifth Circuits clouds this picture, but the actual holding in those cases is in complete accord with *Hicks*. *Id.* Thus, it is premature to grant certiorari since the courts of appeals have read *Hicks* correctly. Until there is a contrary holding from another circuit, this Court should not consider granting certiorari. Any dicta in the circuits should be left to self correction as the weight of authority on *Hicks* continues to accumulate.

Counsel is aware that another certiorari petition relating to *Hicks* was filed on April 4th in *KARE 11 v. Ryther*, No. 96-

1571, appealing an en banc decision of the Eight Circuit upholding *Hicks* principles. If after considering both cases the Court should determine that there is a conflict in the circuits which merits a grant of certiorari, counsel agrees that the present case is well presented and an appropriate vehicle to resolve such conflict.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

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Supreme Court, U.S.
FILED
APR 16 1997
OFFICE OF THE CLERK

No. 96-1231

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

E. I. DU PONT DE NEMOURS AND COMPANY,
Petitioner,

v.

BARBARA R. SHERIDAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I.

In her Opposition, Respondent Sheridan rightly concedes that if this Court finds a conflict among the circuits, "the present case is well presented and an appropriate vehicle to resolve such conflict." (Opp. 9). Indeed, the law of the circuits is in disarray, and litigants are subject to diverse standards as to production of proof in this type of case.

As we amply demonstrated in the Petition (Pet. 6-13), the circuits are deeply divided in their views on the burdens of production of evidence. Respondent's view of the state of the law, especially that DuPont relies upon dicta in the opinions of the First and Fifth Circuits (Opp. 2, 8), is simply in error. The disharmony of the circuits has only been compounded by decisions since the filing of the Petition.

The recent Eighth Circuit *en banc* decision in *Ryther v. KARE 11*, No. 94-3622, 1997 WL 94025 (8th Cir.

(*en banc*) Mar. 6, 1997),[1] reinforces the depth of the division among the circuits. In *Ryther*, the *en banc* court, while stating that it found certain support from *Sheridan v. E. I. du Pont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (*en banc*), was careful to note that unlike *Sheridan*, and consistent with its earlier opinion in *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996), the Eighth Circuit subscribes to the principle that evidence of pretext alone does not always support an inference of intentional discrimination. *Ryther* at *4 n.2.

More specifically, the Eighth Circuit agreed with the Third Circuit's interpretation of *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993), that the elements of a prima facie case together with disbelief of the defendant are the threshold findings beyond which the jury is permitted, but not required to draw an inference of discrimination. *Ryther* at *4. However, the Eighth Circuit carefully "emphasize[d] that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination." *Ryther* at *4. *Sheridan*, on the other hand, stands for the proposition that disbelief, together with the elements of the prima facie case, will always be enough to support a jury verdict. [App. 15a-17a, 26a, 42a-43a]; *see also Ryther* at *4 n.2.

The *Ryther* court highlighted the Eighth Circuit's continued adherence to the principle that pretext alone will not always be sufficient with a discussion of *Rothmeier* and *Barber v. American Airlines, Inc.*, 791 F.2d 658 (8th Cir. 1986). In those two cases, explained the court,

---

[1] Petition for cert. filed April 4, 1997. While *Ryther* deals with issues similar to *Sheridan*, but arising under the Age Discrimination in Employment Act, we submit that the instant case presents a better vehicle than *Ryther* for a clarification of the doctrine set forth in *Hicks*. *Ryther* is a judgment fractured by partial concurrences and dissents. That case also contains a number of facts upon which a jury, following the correct standard, could have found in the favor of plaintiff.

judgment was rendered in favor of the employer because the employees' proof of pretext was simply insufficient to support a reasonable inference of discrimination. *Ryther* at *4 n.4.

Ryther confirms that the division among the circuits remains deep on whether a plaintiff may be required to show more than the minimal prima facie case and disbelief of the defendant's reason in order to permit a jury to draw an inference of the ultimate fact of discrimination.[2]

II.

Since the filing of the petition for writ of certiorari in this case, the Eleventh Circuit handed down another panel decision interpreting *Hicks*, *Combs v. Meadowcraft, Inc.*, No. 95-6922, 1997 U.S. App. LEXIS 3028 (11th Cir. Feb. 20, 1997). At the time of the submission of the petition, the latest Eleventh Circuit opinion interpreting *Hicks* was *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996). In *Isenbergh*, a panel of the Eleventh Circuit determined that *Hicks* supported the conclusion that only "sometimes" will the plaintiff's prima facie case and disbelief of the defendant's reason allow plaintiff to defeat judgment. *Isenbergh*, 97 F.3d at 442.

However, the panel in *Combs* relied upon the earlier decision in *Hairston v. Gainesville Sun Publishing Co.*,

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[2] Eighth Circuit panel decisions since *Ryther* confirm that that court has taken a different path from the Third Circuit. *Feltmann v. Sieban*, 1997 U.S. App. LEXIS, 5138, *15 (8th Cir. March 20, 1997) (even if employer's proffered reason is disbelieved, the jury's verdict must still be supported by evidence of discrimination); *Brandt v. Shop 'n Save Warehouse Foods, Inc.*, 1997 U.S. App. LEXIS 4973, *11-12 (8th Cir. March 17, 1997) (even if employer is found to be "dissembling" about its reasons for an employment action, employee must still prove "that the pretext was intended to conceal unlawful discrimination" or that the protected characteristic "in any way motivated the employment action"); *Thomas v. Runyon*, 1997 U.S. App. LEXIS 5673, *12 (8th Cir. March 18, 1997) (plaintiff failed in his pretext burden "because he has put forward inadequate evidence to prove that his transfer was racially motivated").

9 F.3d 913 (11th Cir. 1993), for the proposition that a plaintiff is entitled to survive summary judgment and judgment as a matter of law based on a prima facie case and disbelief of the employer, "that alone is enough to preclude entry of judgment as a matter of law." *Combs* at *21, *32, *37. The *Combs* panel was concerned that the position of the Eleventh Circuit should be altered on less than a consideration of the problem by the full court; the *Combs* court directed that earlier Eleventh Circuit opinions, and not opinions such as *Isenbergh*, "will be the law of this circuit unless and until the *en banc* Court, the Supreme Court, or Congress changes it." *Ibid.* at *37. Thus, the *Combs* case illustrates that not only does a deep division exist among the circuits, but also within some circuits as well.

III.

Sheridan has both mischaracterized DuPont's positions and misstated a number of important facts. For example:

A. Sheridan was charged with not properly accounting for complimentary food and drinks in the hotel [App. 7a, 31a], not with having "stolen drinks" (Opp. 4). Also, in that regard, if Sheridan refers to Mr. Dougherty as the "male author" of the list of improperly recorded complimentary drinks, the record does not support Sheridan's allegation that he was rewarded by replacing Sheridan in her head captain's job. (Opp. 4-5). In fact, Dougherty did not replace Sheridan. Dougherty testified at trial in 1994, two years after Sheridan left the hotel, that he was then a head captain, but had progressed to that job through several other positions subsequent to his position as bartender, and a training program.

B. In making her statements regarding the gender composition of the head captains (Opp. 5), Respondent overlooks the finding of the district court that women were fully represented in the hotel's head captain and other equivalent positions. [App. 127a].

C. Sheridan mischaracterizies this case as one of "mendacity". (Opp. 2, 4). DuPont's reasons for its actions may not have been accepted by the jury, but neither

the district court nor the court of appeals considered this a "mendacity" case. "To say that a company which in good faith introduces such testimony, or even the testifying employee himself, becomes a liar and a perjurer when the testimony is not believed, is nothing short of absurd." *Hicks*, 113 S.Ct. at 2754. In fact, Sheridan could only refute 7 out of the 46 dates listed by Dougherty [App. 33a], contrary to Sheridan's implication that all dates were disproved (Opp. 4-5), and Dougherty testified that his dates were only about 98 percent accurate. [App. 32a].

D. Contrary to Respondent's mischaracterizations, DuPont did not argue that *Hicks* "was a dramatic and hurtful change in the law for employers" and that a plaintiff always needs additional evidence of discrimination beyond her prima facie case and disbelief of the employer's reason. (Opp. 2, 7). In fact, DuPont has argued consistently that a proper reading of *Hicks* supports its position. (Pet. 13-19). Furthermore, it is DuPont's position that a plaintiff must show *both* that the reason was false, *and* that discrimination was the real reason (Pet. 15), and in *this* case, the disbelief of DuPont's reasons coupled with the bare and minimal facts of Sheridan's prima facie case was not enough to allow an inference of intentional discrimination. (Pet. 13, 16).

DuPont submits that a clear, deep, and persistent divide exists among the circuits on the application of the principles in *Hicks*. The issue is ripe for decision, and the case at bar provides a good vehicle for the clarification of all aspects of *Hicks*. The petition should be granted.

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Supreme Court, U.S.
FILED
APR 15 1997
OFFICE OF THE CLERK

No. 96-1231

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October Term, 1996

E.I. DUPONT DE NEMOURS and COMPANY,

Petitioner,

vs.

BARBARA R. SHERIDAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF *AMICI CURIAE* OF KARE 11, COMBINED COMMUNICATIONS CORP., AND GANNETT CO., INC. IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

KARE 11, Combined Communications Corp., and Gannett Co., Inc. respectfully submit this brief as *amici curiae*. The written consents of the parties have been filed with the Clerk.

INTEREST OF THE *AMICI CURIAE*

KARE 11, Combined Communications Corp., and Gannett Co., Inc. (collectively referred to as "KARE") are petitioners on a petition for a writ of certiorari filed with this Court on April 4, 1997 as Docket No. 96-1571. In that petition, KARE seeks review of an en banc decision of the United States Court of Appeals for the Eighth Circuit rendered in an age discrimination case, in which the en banc Eighth Circuit decided the same issue as the en banc Third Circuit in this matter, and also decided a related question on jury instructions.

Because of the overlapping issues between KARE's petition and the petition filed by E.I. DuPont de Nemours & Co. (the "DuPont petition"), KARE files this *amici curiae* brief respectfully to suggest that the Court may wish to consider deferring its consideration of the DuPont petition until it can simultaneously consider the KARE petition. Additionally, KARE brings to the Court's attention the Eighth Circuit's en banc decision, which is relevant to the Court's consideration of the DuPont petition but was not cited in that petition or the *amicus curiae* brief filed by the Equal Employment Advisory Council

because the Eighth Circuit's en banc decision had not yet been released.

REASONS FOR DEFERRING CONSIDERATION OF THE DUPONT PETITION FOR CERTIORARI

KARE's petition was filed on April 4, 1997, but will likely not be distributed to the Court before its conference on the DuPont petition. KARE's petition seeks review of *Ryther v. KARE 11*, a divided en banc decision of the United States Court of Appeals for the Eighth Circuit dated March 6, 1997 and published at 1997 WL 94025 (8th Cir. March 6, 1997). A response by C. Thomas Ryther to the KARE petition is due May 4, 1997, which puts the KARE petition just a few weeks behind the DuPont petition on the Court's calendar. KARE's petition raises the same issue as the DuPont petition and also presents a related question concerning jury instructions for a discrimination case.

As DuPont's petition explains, the lower courts are deeply divided over how to interpret this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), when faced with motions for summary judgment or judgment as a matter of law. The circuits do not agree on whether *Hicks* means that a reasonable jury which finds the prima facie elements and simply rejects the employer's non-discriminatory reason for termination can *always* infer that plaintiff was a victim of intentional discrimination, or whether the court must still make sure that there is sufficient evidence of discrimination *on the basis of age* (or race, gender, etc.) to sustain a verdict. In

Ryther v. KARE 11, the en banc court of appeals upheld the district court's denial of KARE's motion for judgment as a matter of law even though plaintiff offered no evidence that age had anything to do with the determination made by the actual decisionmakers not to renew plaintiff's contract.

KARE's petition also raises the companion question of how courts should instruct juries on the proof required to show discrimination in light of the burden-shifting formula articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as most recently interpreted in *Hicks*. The en banc Eighth Circuit split evenly on whether the nation's leading treatise on jury instructions, E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Procedure* (hereinafter "Devitt & Blackmar"), recommends an instruction which so seriously misstates the burden of proof required in an age discrimination case that it would constitute reversible error to give that instruction. Six judges of the Eighth Circuit found that giving DeVitt & Blackmar's pattern instruction was reversible error; six judges concluded it was an accurate statement of the law. As described in KARE's petition, the circuits are divided over how to instruct juries in discrimination matters.

The pending KARE petition thus brings the en banc decision of the Eighth Circuit before this Court at the same time as the DuPont petition brings before it the en banc Third Circuit decision; the KARE petition also squarely presents the jury instruction question in addition to the question regarding the standard for judgment as a matter of law.

CONCLUSION

KARE respectfully requests that the Court consider deferring its consideration of the DuPont petition until it can also consider KARE's petition at the same conference.

Respectfully submitted,

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